LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75- **75-844**

EMERSON SUSENKEWA, ET AL., *Petitioners,*

v.

THOMAS S. KLEPPE, Secretary of the Interior, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. PELCYGER
JOHN E. ECHOHAWK
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

Counsel for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	7
A. Background	7
B. The Hopi Constitution	9
C. Description of This Litigation	12
D. Procedural History	16
REASONS FOR GRANTING THE WRIT	17
I. The Absence Of A Party Who Cannot Be Joined Should Not Deprive An Aggrieved Person Of His "Right" To Judicial Review Under The Administrative Procedure Act	19
A. The Decisions Below Conflict With *National Licorice*	19
B. The Decisions Below Discriminate Against Indians	23
C. There Is a Conflict in the Circuits	25
II. Sovereign Immunity Does Not Preclude The Joinder Of The Hopi Tribal Council	28
A. The Denial of the Joinder Motions Conflicts With Decisions of This Court and the Courts of Appeals	28
B. Sovereign Immunity Does Not Apply to Alleged *Ultra Vires* Actions of Tribal Officials; the Decision Below Conflicts With Another Court of Appeals Decision	29

Page

III. The Hopi Tribe Is Not An Indispensable Party .. 30

A. An Indian Tribe Is Not an Indispensable Party When Its Interests Are Being Fully and Adequately Represented by the United States or Its Officers 30

B. This Court's Leading Decision Interpreting the 1966 Amendments to Rule 19 Was Ignored by the Court Below; All Four Rule 19(b) Factors Plus Other Considerations Support a Finding of Non-Indispensability 31

1. *The second factor* 31

2. *The third factor* 33

3. *The fourth and first factors* 34

4. *Other factors militate against dismissal* 37

Conclusion 39

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 137 (1967) .. 23
Barlow v. *Collins*, 397 U.S. 159 (1970) 23, 38
Bell v. *Hood*, 327 U.S. 678 (1946) 18
Bennie v. *Pastor*, 393 F.2d 1 (10th Cir. 1968) 35
Bourdieu v. *Pacific Western Oil Co.*, 299 U.S. 65 (1936) 33, 34, 38
Broussard v. *Columbia Gulf Transmission Co.*, 398 F.2d 885 (5th Cir. 1968) 35
Cady v. *Morton*, — F.2d — (9th Cir. No. 74-1984, June 19, 1975) 26, 27
Cheyenne River Sioux Tribe of Indians v. *United States*, 338 F.2d 906 (8th Cir. 1964), *cert. denied*, 382 U.S. 815 (1965) 30
Choctaw and Chickasaw Nations v. *Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952) 28
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 20, 22, 23
Czaplicki v. *S.S. Hoegh Silvercloud*, 351 U.S. 526 (1956) 17

Page

Davis v. *Morton*, 469 F.2d 593 (10th Cir. 1972) 25, 26, 27, 33, 36, 37
Dodd v. *Spokane County, Wash.*, 393 F.2d 330 (9th Cir. 1968) 17
Dugan v. *Rank*, 372 U.S. 609 (1963) 29
Ex Parte Republic of Peru, 318 U.S. 578 (1943) ..18, 28, 39
Ex Parte Young, 209 U.S. 123 (1908) 29
Federal Trade Commission v. *Flotill Products*, 389 U.S. 179 (1967) 15
Ferguson v. *Thomas*, 430 F.2d 852 (5th Cir. 1970) 35
Gulf Ins. Co. v. *Lane*, 53 F.R.D. 107 (W.D. Okla. 1971) 35
Healing v. *Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd* 373 U.S. 758 (1963) 16
Heckman v. *United States*, 224 U.S. 413 (1912) 18, 30, 31, 39
J. I. Case Co. v. *Borak*, 377 U.S. 426 (1964) 18
Kennerly v. *District Court*, 400 U.S. 423 (1971) 24
Kerrison v. *Stewart*, 93 U.S. 155 (1876) 30
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 29
Levin v. *Mississippi River Corp.*, 289 F. Supp. 353 (S.D.N.Y. 1968) 35
Littell v. *Morton*, 445 F.2d 1207 (4th Cir. 1971), *reversing Littell* v. *Hickel*, 314 F.Supp. 1176 (D. Md. 1970); same case on remand, 369 F.Supp. 411 (D. Md. 1974), *aff'd* 519 F.2d 1399 (4th Cir. 1975) 18, 25, 26, 27, 33, 40
McClanahan v. *Arizona Tax Commission*, 411 U.S. 164 (1973) 24
Means v. *Wilson*, 522 F.2d 833 (8th Cir. 1975) 18, 30, 40
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 17
Morton v. *Ruiz*, 415 U.S. 199 (1974) 24
Mott v. *United States*, 283 U.S. 747 (1931) 14
National Licorice Co. v. *National Labor Relations Board*, 309 U.S. 350 (1940) 18, 19, 20, 21, 22, 31, 38, 39
Natural Resources Defense Council v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972) 36
Natural Resources Defense Council v. *Tennessee Valley Authority*, 340 F. Supp. 400 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972) 32

Page

Owatonna Manufacturing Co. v. *Melroe Co.*, 301 F. Supp. 1296 (D. Minn. 1969) 32, 35, 38
Pan American Petroleum Corp. v. *Udall*, 192 F. Supp. 626 (D.D.C. 1961) 30
Petrol Shipping Corp. v. *Kingdom of Greece, Ministry of Commerce*, 360 F.2d 103 (2d Cir. 1966), *cert. denied*, 385 U.S. 931 (1967) 19, 28
Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 (1968) 14
Powell v. *Zuckert*, 366 F.2d 634 (D.C. Cir. 1966) 17
Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102 (1968) 7, 18, 31, 32, 33, 35, 39
Pueblo of Santa Rosa v. *Fall*, 273 U.S. 316 (1927) 24
Rush & Halloran, Inc. v. *Delaware Valley Financial Corp.*, 180 F. Supp. 63 (E.D. Pa. 1960) 34
Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 29
Seminole Nation v. *United States*, 316 U.S. 286 (1942) 24
Shields v. *Barrow*, 58 U.S. (17 How.) 130 (1855) ..21, 22, 30
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 23
Smith v. *American Federation of Musicians of U.S. & Can.*, 47 F.R.D. 152 (S.D.N.Y. 1969) 32, 35
Stumpf v. *Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961) 34
Tewa Tesuque v. *Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) 26
Tooahnippah v. *Hickel*, 397 U.S. 598 (1970) 20, 38
United States v. *Winans*, 198 U.S. 371 (1905) 39
White Mountain Apache Indian Tribe v. *Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971) (*en banc*) 18, 30
Wilderness Society v. *Morton*, 479 F.2d 842 (D.C. Cir. 1973) (*en banc*), *cert. denied*, 411 U.S. 917 (1973) 36
Young v. *United Steelworkers of America*, 49 F.R.D. 74 (E.D. Pa. 1969) 35
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 37

STATUTES AND RULES:

25 U.S.C. § 396a 5, 12, 13, 14, 37
25 U.S.C. § 461 *et seq.* 7, 8
25 U.S.C. § 476 .....4, 7, 22, 24
28 U.S.C. § 1254 2
28 U.S.C. § 1391(e) 23

Page

Administrative Procedure Act, 5 U.S.C. §§ 701-706 3, 12, 13, 19, 20, 23, 25, 26, 35

FED. R. CIV. PROC. Rule 12 33

FED. R. CIV. PROC. Rule 19 .....5, 6, 19, 28, 31, 33, 34, 35, 37, 38

FED. R. CIV. PROC. Rule 56 33

LEGISLATIVE HISTORY:

S. REP. No. 1992, 87th Cong. 2d Sess., reprinted at 1962 U.S. Code Cong. & Admin. News 2784 23

OTHER AUTHORITIES:

Advisory Committee's Notes to the 1966 Revision of Rule 19 FED. R. CIV. P. 32, 33, 37

"The Indian: The Forgotten American," 81 Harv. L. Rev. 1818 (1968) 23

Hopi Constitution and By-laws .....*Passim*

Proclamation of the Secretary of Interior, December 19, 1936 .....11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-

EMERSON SUSENKEWA, ET AL., *Petitioners,*

v.

THOMAS S. KLEPPE, Secretary of the Interior, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Emerson Susenkewa and sixty (60) other Hopi Indians petition for a writ of certiorari to review

---

[1] This case was filed *sub nom.* Lomayaktewa v. Morton. It was decided in the court of appeals *sub nom.* Lomayaktewa v. Hathaway. As noted by the court of appeals (App. 2a), Starlie Lomayaktewa, originally the first named of the 62 Hopi Indian plaintiffs, dismissed his appeal prior to oral argument. Hence, Emerson Susenkewa, the second named Hopi plaintiff, is the lead petitioner here. We have substituted the new Secretary of the Interior, Thomas S. Kleppe, for the former Secretary Hathaway in accordance with Rule 48(3) of Supreme Court Rules.

the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-6a) [2] is reported at 520 F.2d 1324 (9th Cir. 1975). The district court's "Order of Dismissal" (App. 7a-9a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1975. A timely petition for rehearing was denied on September 18, 1975 (App. 6a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Should an Indian tribe be regarded as an indispensable party in an Administrative Procedure Act suit brought by individual Indians invoking rights under the tribal constitution that challenges the legality of the Secretary of the Interior's approval of a mining lease between the tribe and a coal company?

2. Does sovereign immunity preclude joinder of sovereign entities before sovereign immunity has been raised as a defense?

3. Does sovereign immunity preclude judicial review of the actions of tribal officials or tribal entities that are allegedly in excess of their authority under the tribal constitution?

---

[2] "App." refers to the separately bound appendix to the petition for a writ of certiorari.

STATUTES AND RULES INVOLVED

Administrative Procedure Act

The relevant portions of the Administrative Procedure Act, 5 U.S.C. §§ 702 and 706, provide:

5 U.S.C. § 702. Right of review

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 706. Scope of review

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . . .
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> . . . .

Indian Reorganization Act

Section 16 of the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 987, codified at 25 U.S.C. § 476, provides:

> Organization of Indian tribes; constitution and by-laws; special election
>
> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.
>
> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council

of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Indian Mineral Leasing Act

25 U.S.C. § 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

Rule 19, Fed. R. Civ. P.

Rule 19 of the Federal Rules of Civil Procedure, as amended effective July 1, 1966, provides:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence

may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

Hopi Constitution and By-laws

The Hopi Constitution and By-laws are reprinted in the separately bound Appendix to this petition at pp. 30a-45a. The particular provisions that are most relevant to this proceeding are cited, described or quoted *infra* at pp. 9-14. The Constitution has a higher status than Departmental regulations and was specifically made binding on all officers and employees of the Interior Department. (App. 45a.) It can be amended only by a majority vote of the adult members of the Hopi Tribe. 25 U.S.C. § 476.

STATEMENT OF THE CASE

A longer than usual description of this case is necessary because of the cursory and inaccurate treatment it received in both opinions below. As this Court emphasized in its leading Rule 19 case following the 1966 amendments, *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), application of Rule 19(b)'s "equity and good conscience" test requires careful scrutiny of the circumstances of each case.

A. Background

The setting of this case starts with conditions when the Indian Reorganization Act (IRA) was enacted in 1934. The IRA, 25 U.S.C. §§ 461 *et seq.*, explicitly repealed the then discredited allotment policy and was intended to rejuvenate Indian tribal governments, many of which had been destroyed by prior federal policy and the effects of allotment. Section 16 of the Act, 25 U.S.C. § 476, provided a mechanism for tribes to adopt a constitution and by-laws under the auspices and subject to the approval of the Secretary of the Interior.

Of all the nation's Indian tribes, the Hopis probably had the least need for the IRA. The Hopi Reserva-

tion, set aside by Executive Order in 1882, had never been allotted. Spared of allotment, insulated from most contact with whites, surrounded by Navajos, and tied together by their incredibly strong and all-pervasive religious way of life, the Hopis remained then and still remain the least assimilated of all American Indians. (App. 60a.) They have always maintained their traditional governmental structure under which authority was exercised by the religious leaders of the self-governing villages, comparable in some respects to the city-states of ancient Greece. Prior to 1936, there had never been any central entity corresponding to the Hopi Tribal Council.

Nonetheless, exemplifying the perversity that threads its way through so much federal Indian policy and law, it was the Hopis' fate to become a test case for the new policy. If the Hopis could be convinced to adopt the IRA, according to the reasoning in official circles, so could all of the other Indian tribes.

Mr. Oliver LaFarge, an official of the Bureau of Indian Affairs from Washington who later founded the Association on American Indian Affairs, was assigned the delicate task of negotiating the contents of the new, written constitution with the Hopis. After several weeks on the Reservation, on August 28, 1936, he wrote a memorandum to the Commissioner of Indian Affairs which accompanied and explained a draft of the proposed constitution (App. 52a-60a.) This communication is vitally important because it forms the backdrop to this litigation. Mr. LaFarge wrote (App. 52a-53a):

> About 80% of these Indians follow the Hopi religious and civil establishment today, and desire to continue so doing. They will accept nothing which goes contrary to it. Hence it is necessary

> so to write the document that the old Hopi organization is recognized and protected, and at the same time, so that when the various villages reach the point at which their majorities will wish to take up more modern methods, they will be free to do so.

Mr. LaFarge went on to say:

> In the experience of these Indians, the white man is hostile to the Hopi culture and all that goes with it. Ultimate adoption or rejection of the proposed Constitution will depend on whether it is clearly not inconsistent with that culture. When it is returned from Washington, it will be very carefully examined for changes. The white man, they say, "talks very cleverly to the Hopis. Then he goes back to Washington and does just the other way. Every time the Hopis lose something and the promise is broken."

B. The Hopi Constitution

With minor modification, the constitution proposed by Mr. LaFarge was presented to the Hopis and, following a disputed election in October 1936, its adoption was certified and approved by the Secretary of the Interior. All of the plaintiffs' claims are founded upon its provisions which, as we shall now show, were carefully drafted to safeguard the traditional Hopi way of life until the people of the villages should vote affirmatively to replace the traditional governments with more modern forms of organization.

Article III, section 1 of the Constitution provides that the "Hopi Tribe is a union of self-governing villages sharing common interests and working for the common benefit of all" and then lists the nine Hopi villages. (App. 32a.) Article III, section 2, specifically preserves certain powers of the villages. Sections 3

and 4 of Article III are critical to the issues presented in this case. Section 3 provides that each village shall determine its own form of organization but that until it decides to organize in another manner it "shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its leader."[3] (App. 32a.) Section 4 sets forth the procedure by which, as Mr. LaFarge had put it, the villages could elect to take up more modern methods. Proposed village constitutions could be drawn up, circulated and made known to the members of the village, and then voted upon at the request of the village Kikmongwi or 25% of the village's voting members. The constitution would be deemed adopted if not less than half of the voting members of the village cast their votes and a majority of those voting accepted it. Section 4 goes on to say: "The village Constitution shall clearly say how the Council representatives and other village officials shall be chosen, as well as the official who shall perform the duties placed upon the Kikmongwi in this Constitution." (App. 33a.) *In the 39 years that the Hopi Constitution has been in effect, only one of the Hopi villages, Upper Moencopi, has opted to replace the traditional form of government through the procedure set forth in Article III, section 4.* (R.O.A., Vol. 3, pp. 558 and 750.)[4]

Article IV of the Hopi Constitution defines the makeup of the Council. The Council is to consist of

---

[3] The Kikmongwi is the traditional religious leader of the village whose position is inherited. *See* App. 54a.

[4] "R.O.A." refers to the four volume record on appeal which we have requested the clerk of the Ninth Circuit Court of Appeals to certify and transmit to this Court. The fifth volume, consisting of two transcripts of proceedings, has not been included.

representatives of the various villages. Demonstrating again the deference to and protection of the traditional way of life, Article IV, section 4 provides that "[r]epresentatives shall be recognized by the Council only if they are certified by the Kikmongwi of their respective villages." (App. 34a.)

Article VI (App. 35a) deals with the powers of the Tribal Council. In a contemporaneous (1937) opinion declaring invalid one of the first ordinances enacted by the Hopi Tribal Council, the Solicitor of the Interior Department stated that the powers of the new Council were to be "as close to the legal minimum as possible." (App. 50a.) Under Article VI, section 4 of the Hopi Constitution, all rights and powers of the Hopi Tribe which are not expressly delegated to the Tribal Council are retained by the Tribe and may be exercised through the adoption of appropriate by laws and amendments. (App. 38a.) Article VI, section 3 provides that the Tribal Council may exercise such further powers as might in the future be delegated to it by the members of the Tribe, or by the Secretary of the Interior, "or any other duly authorized official or agency of the State or Federal Government." (App. 38a.)

Secretary of the Interior Harold L. Ickes approved the Hopi Constitution and By-laws by a proclamation dated December 19, 1936. (App. 45a.) Secretary Ickes directed that:

> All rules and regulation heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and By-laws are hereby declared inapplicable to these Indians.

> All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and By-laws.

The constitution remained in its original form until certain amendments, not material to this action, were adopted in 1969. (App. 46a-49a.)

C. Description of this Litigation

Plaintiffs originally brought suit in the United States District Court for the District of Columbia against the Secretary of the Interior and the Peabody Coal Company seeking to set aside the Secretary's approval of a 1966 lease (hereinafter referred to as "the Black Mesa lease") entered into between the Hopi Tribal Council and defendant Peabody's predecessor in interest.[5] (The complaint, together with its exhibits, is reproduced at pp. 10a-51a of the separately bound Appendix to this Petition.) The Secretary's approval of the lease is required by statute, 25 U.S.C. § 396a. Specifically invoking the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, the plaintiffs claimed that the Secretary's approval was arbitrary, capricious, an abuse of discretion, not in accordance with law and in excess of his statutory authority. No specific relief was sought against defendant Peabody. The intervenors are six power com-

---

[5] The United States District Court for the District of Columbia ordered this case transferred to the Federal District Court in Arizona. Plaintiffs' petitions to the United States Court of Appeals for the District of Columbia Circuit and to this Court seeking to reverse this transfer order were unsuccessful. 409 U.S. 843.

panies who have contracted with defendant Peabody for Black Mesa coal.[6]

The plaintiffs are approximately 60 members of the Hopi Tribe, who include the Kikmongwis and other religious leaders from all of the Hopi villages.[7] Their complaint sets forth three causes of action, all of which are predicated upon provisions of the Hopi Constitution designed to protect the traditional Hopi way of life. None of the rights asserted by the plaintiffs arises out of, or is in any way affected by or dependent on, the terms or provisions of the lease.

The first cause of action (App. 19a-21a) alleges, in substance, that the Secretary of the Interior's approval of the Black Mesa strip mining lease is invalid and must be set aside because the Hopi Tribal Council

---

[6] The court of appeals incorrectly states (App. 2a) that this action was brought to void the lease. It is an action under the Administrative Procedure Act (that vital fact is not mentioned in the decision below) to set aside the Secretary's approval of the lease. No relief is sought with regard to the underlying lease.

The court of appeals also erred in describing the term of the lease as ten years. (App. 2a.) The statute, 25 U.S.C. § 396a, *supra*, p. 4, authorizes leases of tribal lands "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." The lease tracks the statutory language. (R.O.A., vol. 2, p. 402.) It is now anticipated that coal will be extracted for at least 35 years from 1971, or until 2006. (R.O.A., vol. 1, pp. 208-209.)

[7] The court of appeals gratuitously and somewhat hostilely comments that the plaintiffs number 62 of a tribe of more than 5,000 Hopi Indians. (App. 2a.) We do not know of any rule that requires the Hopi plaintiffs, or anyone else, to seek out, identify and name as co-plaintiffs all individuals or entities that agree with their position. Indeed, plaintiffs thought that by going to the trouble of identifying and naming some 62 plaintiffs, when one would have sufficed, they would have demonstrated that a substantial portion of the Hopi Tribe shares their views.

did not have the authority to enter into the lease on behalf of the Hopi Tribe. The plaintiffs rely on the Hopi Constitution and By-laws which, they claim, specifically withheld the power to lease or dispose of Hopi lands.

Both the Secretary of the Interior and the Tribal council also concluded that the Tribal Council had not been delegated leasing authority from the Tribe (App. 61a-66a). However, invoking Article VI, section 3 (App. 38a *supra*, p. 11) of the Hopi Constitution and at the Council's request, the Secretary purported to delegate authority to enter into mineral leases to the Hopi Tribal Council. (App. 63a-66a.) The validity of the Secretary's approval of the Black Mesa lease thus turns on the validity of this purported delegation.[8] This purported delegation demonstrates that the Secretary was not a passive observer merely rubber-stamping his approval of the lease. The Secretary's role was pivotal. Without the purported delegation, there would not have been a Black Mesa lease.

In their second cause of action (App. 21a-23a) plaintiffs contend that when the Black Mesa lease was au-

---

[8] It is clear that the Secretary committed a gross error. Article VI, section 4 of the Hopi Constitution specifically provides that the Hopi Tribe retains all powers not "*expressly*" delegated to the Tribal Council. Pursuant to Article VI, section 3 the Tribal Council is authorized to exercise such further powers as may in the future be delegated to it by the Secretary, the Tribe or anyone else. This provision obviously contemplates that these persons or entities could delegate his or its powers to the Council. But the Secretary does not have the power to lease tribal lands in the first instance. 25 U.S.C. § 396a; Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968); Mott v. United States, 283 U.S. 747 (1931). Obviously, the Secretary could not validly delegate to the Council a power that he could not validly exercise himself.

thorized by the Council, several of its members had not been certified by the Kikmongwis of their respective villages as required by Article IV, section 4. Of the 18 Council seats, only 11 were filled and of these only 6 or 7 were properly certified.[9] Therefore, at the time the Black Mesa lease was authorized by the Council, there was no quorum as defined by Article IV, section 6 of the Hopi Constitution and the Secretary of the Interior acted illegally in approving any actions taken at that meeting.[10]

The complaint's third cause of action (App. 24a-25a) alleges in general that the Secretary acted arbitrarily, capriciously and abused his discretion in the manner in which he has administered Hopi affairs and his obligations to the plaintiffs under the United States and Hopi Constitutions and that he has engaged in a pattern and practice of discriminating against one faction of Hopis in favor of another. It is further alleged that the Secretary's arbitrary and capricious conduct has resulted in the execution and approval of the Black Mesa strip mining lease. This cause of action is the least developed in terms of documentation and discovery of relevant records. It obviously draws in part on the substantiated allegations of the first and second causes of action.

---

[9] Most of these allegations have been admitted by the Secretary of the Interior in discovery conducted prior to the district court's dismissal. *See* R.O.A., vol. 3, pp. 558-560, 750 and 751.

[10] Article IV, section 6 provides: "No business shall be done unless at least a majority of the members are present." This means that if there are 18 seats on the Council, a majority, or 10, is required to conduct business. *See* Federal Trade Commission v. Flotill Products, 389 U.S. 179 (1967).

D. Procedural History

The defendants and the intervenors moved to dismiss this case on several grounds (R.O.A., vol. 1, pp. 111 *et seq.*, 166 *et seq.*, and vol 2, pp. 338 *et seq.*) while the plaintiffs moved for summary judgment on their first cause of action. (R.O.A., vol. 2, pp. 358 *et seq.*) Upon the motion of defendant Peabody (R.O.A., vol. 4, pp. 859 *et seq.*), the court ordered a briefing schedule and hearing limited to the motion to dismiss the complaint for failure to join the Navajo and Hopi Indian Tribes and the United States as indispensable parties (R.O.A., vol. 4, p. 1018). The plaintiffs then moved to join the United States and the Hopi Tribal Council as parties defendant and also moved to join the Navajo Tribe as a party, or, in the alternative, to give notice of the pendency of this action to the Navajo Tribe (App. 67a-71a).[11] The plaintiffs' joinder motions, which were not mentioned by the court of appeals, alleged that the Hopi and Navajo Tribes and the United States were not indispensable parties. The plaintiffs requested that the joinder order provide that the action would proceed in the absence of the Hopi and Navajo Tribes and the United States if they were unwilling to join.

On February 16, 1973, the District Court entered its order (App. 7a-9a) denying the plaintiffs' motion to

---

[11] The interest of the Navajo Tribe arises by virtue of its joint ownership with the Hopi Tribe of the area covered by the Black Mesa lease. *See* Healing v. Jones, 210 F.Supp 125 (D. Ariz. 1962), *aff'd* 373 U.S. 758 (1963). The Navajos executed a separate lease with Peabody's predecessor which is not at issue in this litigation.

join and dismissing the complaint for failure to join indispensable parties. [12]

On appeal, the Court of Appeals for the Ninth Circuit affirmed, holding that the Hopi Tribe was an indispensable party which could not be joined because of its sovereign immunity. It specifically declined to reach the alleged indispensability and sovereign immunity of the Navajo Tribe and the United States. (App. 2a.) [13]

REASONS FOR GRANTING THE WRIT

The Hopi Tribal Council was supposed to be the servant of the Hopi Indians, but by the distorted reasoning of the courts below, it has been transformed into their absolute master. The lower courts held, though their opinions do not even acknowledge it, that the rights granted, recognized or protected by the Hopi Constitution are as fragile as the paper on which they are written for they can be violated with impunity by

---

[12] Though it is far from clear, the district court's order may also have been based on the alternative ground of laches. (App. 8a-9a.) Laches had not been raised in any of the defendants' or intervenors' motions to dismiss and the court had issued an order that specifically limited the briefing and the hearing on the motion to dismiss to the indispensable party issue. Consequently, the district court's finding the plaintiffs guilty of laches clearly constituted a denial of due process of law. Morrissey v. Brewer, 408 U.S. 471 (1972); Dodd v. Spokane County, Wash., 393 F.2d 330 (9th Cir. 1968). This is especially true since the very nature of the laches defense clearly requires an opportunity for an evidentiary hearing. Czaplicki v. S.S. Hoegh Silvercloud, 351 U.S. 525 (1956); Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966).

[13] Hence ,the only questions raised in this petition concern the alleged indispensabilty and sovereign immunity of the Hopi Tribe. If this Court should grant the petition for a writ of certiorari and reverse, the Ninth Circuit would then be called upon to rule on the issues that it left undecided, including laches.

the Hopi Tribal Council. The decisions below must also be taken to hold, again *sub silentio*, that though the Secretary exceeded his authority in approving the lease and violated the plaintiffs' rights in the process, there is no judicial remedy. It is as if American courts were powerless to grant relief to American citizens when the federal government ignores the Bill of Rights. Needless to say, concluding that Congress created remediless rights is not a result that is easily reached. [14]

The decision of the district court and the court of appeals are inconsistent with no fewer than four decisions of this Court, none of which was even mentioned in either opinion. *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350 (1940); *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968); *Heckman* v. *United States*, 224 U.S. 413 (1912); and *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). Further, the decision of the court of appeals has created a conflict in the circuits on three important issues: whether federal courts can consider the merits of challenges to the legality of the Secretary of the Interior's action approving or implementing contracts with Indians despite the absence of the tribal signatories; [15] whether sovereign immunity can insulate the alleged *ultra vires* actions of the tribal officials from judicial review; [16] and whether sovereign immunity

---

[14] J. I. Case Co. v. Borak, 377 U.S. 426, 433-434 (1964); Bell v. Hood, 327 U.S. 678, 684 (1946).

[15] *Compare* the decision of the court of appeals below with Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971) and Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).

[16] *Compare* the decision below with Means v. Wilson, 522 F.2d 833 (8th Cir. 1975). *See also* White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971) (*en banc*).

precludes the joinder of sovereign entities before that defense has been raised.[17] It does not properly analyze three of Rule 19(b)'s four factors. It nullifies virtually all of the provisions of the Hopi Constitution which were carefully drafted to preserve traditional Hopi ways until the Hopis themselves should vote for change. And it takes away from the Hopis and all other similarly situated American Indians their rights, as aggrieved persons, to judicial review of agency actions when their tribal councils refuse to participate in litigation.

For the reasons set forth in this Petition, most particularly the court of appeals' total disregard of four controlling decisions of this Court, the decision of the court of appeals is an apt candidate for summary reversal.

I.

THE ABSENCE OF A PARTY WHO CANNOT BE JOINED SHOULD NOT DEPRIVE AN AGGRIEVED PERSON OF HIS "RIGHT" TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT.

A. The Decisions Below Conflict with National Licorice.

The Administrative Procedure Act, 5 U.S.C. § 702, provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, *is entitled* to judicial review thereof." (Emphasis added.) We are not aware of any other authority holding that the vital right afforded by this statute may be extinguished by the impossibility of

---

[17] Compare the decision below with Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, 360 F.2d 103, 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 931 (1967).

obtaining jurisdiction over an absent party. Certainly this Court has never sanctioned such a result

This Court held in *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970), that the Secretary of the Interior's approval of a disposition of Indian property is subject to judicial review under the Administrative Procedure Act. Though *Tooahnippah* involved the Secretary's approval of a will, whereas the subject of this case is his approval of a lease, there is no meaningful distinction between the two functions so far as judicial review under the Administrative Procedure Act is concerned. [18]

National Licorice Co. v. *NLRB, supra*, 309 U.S. 350, holds that the ordinary rules governing joinder of parties in private litigation do not apply in suits brought to protect or enforce public rights. *National Licorice* involved an order issued by the National Labor Relations Board which prohibited an employer from giving effect to contracts that he had entered into with his individual employees. This Court held that the order could be enforced despite the absence of the individual employees. The rationale was that absent parties to a contract are not regarded as indispensable to a suit to prevent its enforcement where the rights asserted by the plaintiffs arise independently of the

---

[18] In this case, the Secretary admitted that: "Prior to approving a lease of Indian tribal lands for mineral or other purposes, the Secretary of the Interior must be satisfied that the prospective lessor of tribal lands is an entity or individual with the legal authority to execute leases of tribal lands." (R.O.A., vol. 3, pp. 557 and 748.) Thus there is manifestly "law to apply" and the "narrow" exception to the Administrative Procedure Act for "agency actions committed to agency discretion by law" is plainly inapplicable. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410-413 (1971).

contract, particularly where they are founded upon the public laws of the United States.

> In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. [Citing, *inter alia, Shields* v. *Barrow,* 58 U.S. (17 How.) 130, 140.] Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present.
>
> But different considerations may apply even in private litigation where the rights asserted arise independently of any contract which an adverse party may have made with another, not a party to the suit, even though their assertion may affect the ability of the former to fulfill his contract. The rights asserted in the suit and those arising upon the contract are distinct and separate, so that the Court may, in a proper case, proceed to judgment without joining other parties to the contract, shaping its decree in such manner as to preserve the rights of those not before it [citations omitted].

National Licorice Co. v. *National Labor Relations Board, supra,* 309 U.S. at 363. As noted, in this passage this Court cited and distinguished the line of cases originating with *Shields* v. *Barrow,* 58 U.S. (17 How.) 130 (1855), on which the court of appeals rested its decision in this case.

This Court and others have paid unspoken allegiance to the principle of *National Licorice* in not applying strict joinder rules in suits seeking the enforcement of public rights. One recent example of this is *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), in which the City of Memphis was not a party to a suit challenging the federal government's approval of the City's decision to build a highway through a City Park.[19] If all parties who stand to be affected by the outcome of suits challenging agency actions must be joined pursuant to Rule 19(a), much of that litigation would quickly become unmanageable, and if such parties are deemed indispensable, no single court could obtain jurisdiction over many such controversies.

The public rights that the plaintiffs seek to enforce in this action arise under the Hopi Constitution and By-laws, adopted by the Hopi Tribe and approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 U.S.C. § 476. They do not depend upon any provision, actual or potential, of the lease between the Hopi Tribe and the Peabody Coal Company or upon any action or failure to act of any of the parties in the performance of the contract. The plaintiffs claim that the Secretary exceeded his authority in approving the lease because the Hopi Tribe has not authorized the Hopi Tribal Council to lease tribal lands and because the Hopi Tribal Council which entered into the lease was not properly constituted. This case so clearly comes within *National Licorice*'s qualification to the rule of *Shields* v. *Barrow* that summary reversal is warranted on this basis alone.

---

[19] The City of Memphis did participate in an *amicus curiae* capacity before this Court. *See* 28 L.Ed.2d at 924.

B. The Decisions Below Discriminate Against Indians.

The effect of the decisions below is to carve out a significant exception to the "generous" judicial review provisions of the Administrative Procedure Act.[20] Secretarial approvals of actions taken by Indian tribal councils are, under this view, shielded from review, even where Secretarial approval is required by Congress and is alleged to have been illegally given, unless the tribe itself brings the suit or consents to being joined. This inroad works a particular injustice on reservation Indians who probably have more need than anyone else to hold government and tribal officials accountable for their actions.[21]

The practical result of the court of appeals' decision is to permit the Secretary to hide his illegalities behind tribal entities, at least as long as they are willing to play along. But this Court has expressly held to the

---

[20] *See* Abbott Laboratories v. Gardner, 387 U.S. 137, 140-1 (1967); Barlow v. Collins, 397 U.S. 159, 166-7 (1970); and Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). The decision below runs counter not only to these recent decisions construing the Administrative Procedure Act but also to this Court's expansion of the concept of standing in actions against public officials to include non-economic injuries, *see* Sierra Club v. Morton, 405 U.S. 727, 738 (1972), and to Congress' efforts "to facilitate review by the Federal Courts of administrative actions." S. REP. No. 1992, 87th Cong. 2d Sess., reprinted at 1962 U.S. Code Cong. & Admin. News 2784 at 2785, reporting on the bill, now 28 U.S.C. § 1391(e), that permits federal officials to be sued in any federal district court.

[21] *See, e.g.*, Note, "The Indian: The Forgotten American," 81 Harv. L. Rev. 1818 at 1820 (1968): "[A]lthough the normal expectation in American Society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government."

contrary. The actions of tribal officials cannot insulate responsible government officials from being held accountable for violating their obligations to individual Indians. *Seminole Nation* v. *United States,* 316 U.S. 286, 295-301 (1942). In another context, this Court has not hesitated to declare invalid the *ultra vires* actions of an Indian tribal council which resulted in individual Indians illegally being subjected to state court jurisdiction. *Kennerly* v. *District Court,* 400 U.S. 423 (1971). *See also Pueblo of Santa Rosa* v. *Fall,* 273 U.S. 316 (1927). And this Court has recently emphasized that the rights of individual Indians, no less than tribal rights, must be protected and enforced. *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164, 181 (1972). *See also Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974). Absolute deference to Indian tribal councils is particularly inappropriate where, as here, (1) the plaintiffs invoked specific provisions of their tribal constitution designed to protect them against possible excesses by their tribal council, (2) the federal government, acting through the Department of the Interior, specifically undertook to guarantee the plaintiffs' rights as set forth in the constitution (App. 45a), and (3) the alleged illegal actions resulted in the alienation of tribal property in which all tribal members have an undivided interest. Such deference and the resulting absence of accountability is particularly unjustified and unwarranted here. The effect of the challenged action of the Secretary was to amend unilaterally the Hopi Constitution by purporting to delegate to the Tribal Council leasing authority that was retained by the Tribe (*supra,* p. 14). The Secretary usurped the power that was specifically reserved to tribal members. (App. 38a, 40a-41a and 25 U.S.C. § 476.) If the Secretary of the Interior and Indian

tribal councils can collaborate in this way to repeal tribal constitutions, the protections that they afford to individual tribal members are worthless.

C. There Is a Conflict in the Circuits.

The decision of the Court of Appeals for the Ninth Circuit in this case conflicts with holdings of two other circuits in *Littell* v. *Morton,* 445 F.2d 1207 (4th Cir. 1971), *reversing Littell* v. *Hickel,* 314 F. Supp. 1176 (D. Md. 1970), and *Davis* v. *Morton,* 469 F.2d 593 (10th Cir. 1972). Both *Littell* and *Davis* held that federal courts could consider the merits of challenges to the legality of the Secretary of the Interior's actions approving or implementing contracts with Indians despite the absence of the tribal signatories.

Littell v. *Morton, supra,* was a suit by the former attorney of the Navajo Tribe against the Secretary of the Interior. Invoking the judicial review provisions of the Administrative Procedure Act, Mr. Littell challenged the Secretary's refusal to make certain payments claimed to be owed under the attorney's contract with the Tribe. The Court of Appeals for the Fourth Circuit reversed the district court's dismissal.

Littell presents a far more compelling case for a finding of indispensability than this case because (a) the rights sought to be enforced were private rather than public in nature; they arose under the contract between the Navajo Tribe and its attorney; (b) the suit necessarily involved an interpretation of the terms and provisions of that contract; and (c) the judgment would be satisfied out of tribal funds. Nevertheless, the suit proceeded in the absence of the Navajo Tribe and Mr. Littell was eventually successful. *Littell* v.

Morton, 369 F. Supp. 411 (D. Md. 1974), *aff'd*, 519 F.2d 1399 (4th Cir. 1975).

Davis v. *Morton*, *supra*, was a suit, also brought by non-Indians, to set aside the Secretary's approval of a lease between an Indian tribe and a development company, Sangre de Cristo. Neither the Indian lessor nor the non-Indian lessee was joined; yet the court of appeals ordered the district court to grant the relief sought on the grounds that the Secretary acted illegally in failing to comply with the National Environmental Policy Act. *See also Cady* v. *Morton*, —— F.2d —— (9th Cir. No. 74-1984, June 19, 1975). The indispensability and sovereign immunity issues were not specifically addressed in *Davis*.[22]

The only possible basis for distinguishing this case from *Littell* and *Davis* is that this case was brought by Indian plaintiffs, members of the Hopi Tribe, whereas

---

[22] Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975), is not to the contrary, for, unlike this case, it specifically reached the merits and held that the challenged actions of the federal officials "are within the outer perimeter of their authority." 498 F.2d at 243. Tewa Tesuque is therefore consistent with Littell and Davis in holding that the lawfulness of the Secretary of the Interior's approval or implementation of contracts or leases with Indan tribes can be reviewed under the Administrative Procedure Act in the absence of the tribal signatory. With regard to indispensability, Tewa Tesuque holds that the tribal lessor is an indispensable party to an action to cancel a tribal lease that is predicated on the specific terms and provisions of the lease or the performance (or lack thereof) under the lease, i.e., when it is based on private contractual rights rather than public rghts. Petitioners have no quarrel with that holding though it appears to be inconsistent with Littell. Tewa Tesuque, unlike this case, did not involve any claim that the tribal officials had exceeded their authority as defined under the tribal constitution. And this action, unlike Tewa Tesuque, does not seek cancellation of the underlying lease.

Littell and *Davis* were initiated by non-Indians. We fail to see any possible bearing of this racial distinction. It is true that the Hopi plaintiffs theoretically have available non-judicial tribal remedies, convincing the Tribal Council to change its ways and admit its errors or replacing its members at the next election. But non-Indians have similar remedies. The courts have not told environmental organizations to elect a new President or a new Congress or to replace the Governor of California or to convince the Secretary of the Interior to change his mind when they complain that state or federal officials are not complying with existing law. The Hopi Constitution can no more be discarded in favor of electoral or political reform than can the Bill of Rights, the Civil Rights Acts or the National Environmental Policy Act. Indians are citizens. They are entitled to the same judicial treatment as non-Indians.

Unless this conflict in the circuits is resolved, tribes and their counsel will be placed in an impossible quandry. If tribes are not indispensable in suits against the Secretary of the Interior, they probably would be well advised to participate voluntarily in litigation in order to insure that their interests are protected. That was the choice of the Crow Tribe in *Cady* v. *Morton*, *supra*, —— F.2d ——. On the other hand, if they can defeat the court's jurisdiction by remaining outside the litigation, they might choose that course. With the existing confusion and conflict, tribes are at a loss to know how their interests can best be protected.

II.

SOVEREIGN IMMUNITY DOES NOT PRECLUDE THE JOINDER OF THE HOPI TRIBAL COUNCIL.

A. The Denial of the Joinder Motions Conflicts with Decisions of This Court and the Courts of Appeals.

As noted in our Statement of the Case, the plaintiffs moved to join the Hopi Tribal Council and the United States and the Navajo Tribe but the motions were denied by the district court. The court of appeals affirmed this disposition *sub silentio* without even mentioning that joinder had been sought.

The district court's denial of the joinder motion was clear error. Rule 19(a) requires (it uses the word "shall") the joinder of persons who meet the requirements of the rule, are subject to service of process, and whose joinder will not deprive the court of jurisdiction. Sovereign immunity does not preclude joinder any more than it bars service of process. Once a sovereign entity is joined, it may properly raise the sovereign immunity defense, but it must be pleaded and it can be waived. Sovereign immunity can only be considered after the party is ordered joined and it has been raised as a defense. This Court so held in *Ex parte Republic of Peru*, 318 U.S. 578, 587-588 (1943), and several courts of appeals have followed suit. *Petrol Shipping Corp.* v. *Kingdom of Greece, Ministry of Commerce*, 360 F.2d 103, 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 931 (1967); *Choctaw and Chickasaw Nations* v. *Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952).

The district court's denial of the motion to join the Hopi Tribal Council, affirmed *sub silentio* by the court of appeals, is clearly and flatly inconsistent with these authorities. Since the Tribal Council could and should

have been joined, the dismissal predicated on the failure to join was plain error that must be reversed.

B. Sovereign Immunity Does Not Apply to Alleged Ultra Vires Actions of Tribal Officials; the Decision Below Conflicts with Another Court of Appeals Decision.

As we have just shown, the district court should have granted the plaintiffs' motion to join the Hopi Tribal Council. Consideration of the sovereign immunity defense was not appropriate until after the Council had been joined and raised the issue. But that objection aside, sovereign immunity does not have any application to the Hopi Tribe in this case for it cannot be invoked where, as here, plaintiffs alleged that the Hopi Tribal Council's execution of the Black Mesa lease was an illegal act, in excess of its authority.

It is, of course, well recognized that *ultra vires* actions of state or federal officials are not properly subject to the sovereign immunity defense. *Ex Parte Young,* 209 U.S. 123 (1908); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949); *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974). There is absolutely no reason why the same rule should not apply to alleged *ultra vires* actions of tribal officials. Indeed it must. Actions that exceed an officer's authority are not actions of the sovereign. Here the plaintiffs alleged that the Hopi Tribal Council executed a lease in clear, blatant and flagrant violation of the restrictions on its delegated powers contained in the Hopi Constitution and By-laws. The decisions below mean that sovereign immunity insulates the *ultra vires* actions of tribal officials from judicial review even though, in the same circumstances, state and federal officials could and would be held accountable.

Both the Arizona Supreme Court and the Court of Appeals for the Eighth Circuit have held to the contrary. *White Mountain Apache Indian Tribe* v. *Shelley,* 107 Ariz. 4, 480 P.2d 654 (1971) (*en banc*); *Means* v. *Wilson,* 522 F.2d 833 (8th Cir. 1975). This issue and this conflict merit this Court's attention. The Nation's Indians are not favored by a decision which renders the actions of their tribal officials beyond judicial recourse.

III.

THE HOPI TRIBE IS NOT AN INDISPENSABLE PARTY.

A. An Indian Tribe Is Not an Indispensable Party When Its Interests Are Being Fully and Adequately Represented by the United States or Its Officers.

Heckman v. *United States,* 224 U.S. 413, 444-446 (1912), holds that the Indian beneficial owners of land are not necessary or indispensable parties when the United States participates in litigation and fully and adequately represents their interests. *Heckman* was a suit to cancel conveyances executed by members of the Cherokee Tribe. Once again, the rule of *Shields* v. *Barrow* 58 U.S. (17 How.) 130 (1855), was specifically distinguished and held inapplicable. 224 U.S. at 444. The *Heckman* principle has been consistently followed in other Indian cases. *Cheyenne River Sioux Tribe of Indians* v. *United States,* 338 F.2d 906 (8th Cir. 1964), *cert. denied,* 382 U.S. 815 (1965); *Pan American Petroleum Corp.* v. *Udall,* 192 F. Supp. 626 (D.D.C. 1961). Of course, the same rule applies in non-Indian contexts. Where the trustee is capable of fully representing the interests of the beneficiary, the beneficiary is not an indispensable party. *See Kerrison* v. *Stewart,* 93 U.S. 155 (1876), on which both *Heckman* and *Pan American Petroleum* rely.

Here, the answer of the defendant Secretary of the Interior (R.O.A. vol. 1, pp. 97-104) leaves no doubt that whatever interest the Hopi Tribe or the Hopi Tribal Council might have in upholding the validity of the Secretary's approval of the Black Mesa lease is being vigorously asserted by their trustee. Therefore, under the *Heckman* rule, the Hopi Tribe is neither a necessary nor an indispensable party. Indeed, it is all the more appropriate that this suit be defended by the trustee since it is the Secretary's actions that are being challenged and it is the Secretary's actions which made the Black Mesa lease possible.

B. This Court's Leading Decision Interpreting the 1966 Amendments to Rule 19 Was Ignored by the Court Below: All Four Rule 19(b) Factors Plus Other Considerations Support a Finding of Non-indispensability.

Perhaps even more remarkable and less excusable than the court of appeals' failure even to mention, let alone attempt to distinguish, *National Licorice* or *Heckman* is its total disregard of the leading case interpreting the 1966 amendments to Rule 19, *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968). In two critical respects, the court of appeals' assessment of Rule 19(b)'s factors is directly at variance with *Provident Tradesmens Bank*.

1. The second factor.

The opinion of the court of appeals states (App. 5a): "The second factor, 'the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided', is simply not present in this case." Yet one of the means by which prejudice can be lessened or avoided is by the voluntary appearance by the absent

party. This avenue is specifically mentioned in the Advisory Committee's Notes to the 1966 revision of Rule 19:

> Sometimes the party is himself able to take measures to avoid prejudice .... [T]he absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis [Citations omitted.] The court should consider whether this, in turn, would impose undue hardship on the absentee.[23]

Provident Tradesmens Bank underlines the importance of the availability of intervention. It teaches that the "purpose[ful] bypass[ing] of an adequate opportunity to intervene" should be counted heavily against a finding of indispensability because "any rights [of the absent party] have been lost by his own inaction." *Provident Tradesmens Bank, supra,* 390 U.S. at 114. Consequently, not only is the second factor present in this case, it strongly supports a finding of non-indispensability.

Following the leads of this Court in *Provident Tradesmens Bank* and the Advisory Committee's Notes, several lower courts have given considerable weight to the possibility of intervention in deciding not to regard the absent party as indispensable. *Natural Resources Defense Council* v. *Tennessee Valley Authority,* 340 F. Supp. 400 (S.D.N.Y. 1971), *rev'd on other grounds,* 459 F.2d 255 (2d Cir. 1972); *Smith* v. *American Federation of Musicians of U.S. & Can.,* 47 F.R.D. 152 (S.D.N.Y. 1969) and *Owatonna Manufac-*

---

[23] Quoted in 3A Moore's Federal Practice § 19.01 [5.-4] [1974 Ed.], 39 F.R.D. 89 at 92 and 28 U.S.C. Rule 19 at pp. 104, 106-107 [1972 Ed.].

turing Co. v. *Melroe Co.*, 301 F. Supp. 1296 (D. Minn. 1969). The failure of both lower courts even to consider the possibility of intervention is inexplicable.

2. The third factor.

As this Court noted in *Provident Tradesmens Bank, supra,* Rule 19(b)'s third factor, "whether a judgment rendered in the person's absence will be adequate," is puzzling. "Clearly the plaintiff, who himself chose the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them." *Provident Tradesmens Bank, supra,* 390 U.S. at 111.[24] Moreover, if a court cannot grant adequate relief with the parties before it, the action should be dismissed pursuant to Rule 12 or 56, not Rule 19, and there would be no occasion to reach the indispensable party issue. *Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65 (1936). *See Provident Tradesmens Bank, supra,* 390 U.S. at 111, n. 7. For these reasons, this Court adopted an interpretation of Rule 19(b)'s third factor that is somewhat at variance with its literal language.

> [T]here remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, *whenever possible*. . . .

Provident Tradesmens Bank, supra, 390 U.S. at 111 (emphasis added).

The court of appeals and the district court simply ignored this Court's analysis of the third factor—

---

[24] Here, as both Littell v. Morton, *supra*, and Davis v. Morton, *supra*, demonstrate, a judgment setting aside the Secretary's approval of the Black Mesa lease is plainly sufficient from the plaintiffs' standpoint.

treating it for all intents and purposes as identical to the first. Had it asked the correct question, whether the plaintiffs had done everything possible to settle this dispute by wholes rather than in parts, it would surely have answered in the affirmative. The only thing standing in the way of having all of the parties to the Black Mesa lease and all those interested in its performance in the same court at the same time is the refusal of the Hopi Tribal Council to participate voluntarily in this action. Surely that refusal should not be counted against the plaintiffs who have done everything within their power to bring the Tribal Council into court to account for its actions.

If the court of appeals had done nothing other than to consult and apply this Court's leading case interpreting Rule 19(b), it would have found, at a minimum, that three of its four criteria (numbers 2, 3 and 4) clearly support a finding of non-indispensability. That surely would have been enough to tip the balance in favor of providing the Hopi plaintiffs their day in court.

3. The fourth and first factors.

Rule 19(b)'s fourth factor, "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder" has been regarded as the single most important consideration in its "equity and good conscience" test. *Cf. Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65, 71 (1936).[25] Virtually without exception,

[25] "We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in." *Accord:* Stumpf v. Fidelity Gas Co., 294 F.2d 886, 891 (9th Cir. 1961); Rush & Halloran, Inc. v. Delaware Valley Financial Corp., 180 F. Supp. 63, 65-66 (E.D. Pa. 1960).

in all of the cases that have been dismissed for nonjoinder since the 1966 Amendments to Rule 19 and this Court's decision in *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra*, 390 U.S. 102, there was a finding that the plaintiff would have a remedy in another available forum. In such cases, "dismissal was really just a form of transfer of the action to a more appropriate forum." *Ferguson* v. *Thomas*, 430 F.2d 852, 860 (5th Cir. 1970), commenting on *Broussard* v. *Columbia Gulf Transmission Co.*, 398 F.2d 885 (5th Cir. 1968). Conversely, in virtually all cases decided since 1966 in which courts have refused to regard the absent party as indispensable, the lack of an alternate remedy figured prominently. *See, e.g., Bennie* v. *Pastor*, 393 F.2d 1 (10th Cir. 1968).[26]

When plaintiffs' "right" to judicial review under the Administrative Procedure Act is coupled with the absence of an alternate forum, the ability of the Hopi Tribe to intervene in this litigation, and the active participation of the trustee acting in behalf of its beneficiary, we think it is abundantly clear that the lower courts erred in dismissing for nonjoinder.

The lower courts also erred in their very superficial and mistaken analysis of the first factor, "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties." Any judgment rendered in this case would not take away any coal from the Hopi Tribe or preclude the Hopi Tribe from entering into a lease with defendant

---

[26] *See also* Smith v. American Federation of Musicians of U.S. & Can., 47 F.R.D. 152 (S.D.N.Y. 1969); Gulf Ins. Co. v. Lane, 53 F.R.D. 107 (W.D. Okla. 1971); Levin v. Mississippi River Corp., 289 F. Supp. 353 (S.D.N.Y. 1968); Young v. United Steelworkers of America, 49 F.R.D. 74 (E.D. Pa. 1969); and Owatonna Manufacturing Co. v. Melroe Co., 301 F. Supp. 1296 (D. Minn. 1969).

Peabody or anyone else *provided only that the procedures required by the Hopi Constitution are followed.* In this respect this case is similar to, for example, *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972), enjoining the Department of the Interior from executing oil and gas leases for submerged government land pending compliance with applicable law, the National Environmental Policy Act of 1969 (NEPA), or *Davis* v. *Morton, supra,* 469 F.2d 593 (10th Cir. 1972), setting aside and enjoining the Secretary's approval of a major development lease of Indian lands pending compliance with applicable law, also NEPA, or *Wilderness Society* v. *Morton*, 479 F.2d 842 (1973) (*en banc*), *cert. denied*, 411 U.S. 917 (1973), enjoining the Secretary of the Interior from granting a right of way for the trans-Alaska oil pipeline which exceeded the width limitations of the Mineral Leasing Act of 1920, 30 U.S.C. § 185. These judgments do not take away the Indians' or the government's land or the anticipated benefits that flow from leasing the land or granting the right of way. They simply require compliance with applicable law before the lease or grant can be given effect. In the case of the Alaska pipeline, the defect could only be cured by Act of Congress. It was. Public Law 93-153, 87 Stat. 576.

Properly posed, the first factor requires analyzing and answering the following question: would a judgment requiring the Hopi Tribal Council to comply with the Hopi Constitution and By-laws prejudice the Hopi Tribe when the Tribe could, if it so desired, enter into a new lease after complying with the provisions of the Hopi Constitution? We fail to see how a judgment requiring compliance with its own organic governing document can be prejudicial to the Hopi Tribe. And if the plaintiffs should prevail and the Hopi Tribe

then refused to amend its constitution or to authorize a new lease, it would be an absurdity to suggest that the Tribe had been prejudiced by this action.

The opinon of the court of appeals makes two other obvious mistakes in its analysis of the first factor. (App. 5a.) Setting aside the Secretary's approval of the lease would not eliminate the employment of many of the Hopis. We are informed that few, if any, Hopis are employed at the Black Mesa mine. There is nothing to the contrary in the record on this motion to dismiss. And we fail to see how Peabody can be obligated to make royalty payments under the lease after (and assuming) the Secretary's approval is set aside by a court of competent jurisdiction when the Secretary's approval is a statutory prerequisite to the lease's validity. 25 U.S.C. § 396a. *See Davis* v. *Morton, supra.*

The decisions below amount to determinations by the lower courts that the Black Mesa lease is more important to the Hopi Tribe than the integrity of its tribal processes. But there is no reason why the Tribe cannot lease its coal, if it so desires, in a manner that complies with the requirements of the Hopi Constitution. And we are not aware of any other judicial pronouncement to the effect that governing law can be jettisoned in order to meet what appear to be the exigencies of the moment. All of the law in this nation of laws is *contra. Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

4. Other factors militate against dismissal.

The four specific factors enumerated in Rule 19(b) "are not intended to exclude other considerations which may be applicable in particular situations." Advisory Committee Notes, *supra*, quoted at 3A Moore's Federal

Practice, § 19.01 [5.-4] (1974 Ed.), 39 F.R.D. 89 at 92 and 28 U.S.C. Rule 19, at p. 106 (1972 Ed). There are several additional considerations that militate very strongly against dismissal. The plaintiffs have invoked the jurisdiction of a court of equity,[27] have alleged the infringement of public, as opposed to private, rights,[28] and have a Congressionally granted "right" to judicial review of the Secretary of the Interior's approval of the Black Mesa lease.[29] Further, dismissal for nonjoinder would render the specific, federally guaranteed protections of the Hopi Constitution a nullity.[30] But the additional factor that we deem particularly important is that the absent party's views and positions are *extremely* well represented by the existing parties. This consideration was also ignored by both lower courts. The federal government, Peabody, the Nation's largest coal producer, and six power companies are straining with all of the considerable resources at their command to uphold the validity of the Secretary's approval of the Black Mesa lease.[31] This is not an instance in which the absent party's views will not be adequately presented. Indeed, as previously shown, the presence of the absent party's trustee, standing alone, is a sufficient reason to deny the motion to dismiss for nonjoinder.

---

[27] *See* Bourdieu v. Pacific Western Oil Co., *supra*, 299 U.S. at 70-71.

[28] *See* National Licorice Co. v. NLRB, *supra*, 309 U.S. at 363-364.

[29] *See* Tooahnippah v. Hickel, 397 U.S. 598 (1970).

[30] *See* Barlow v. Collins, 397 U.S. 159, 167 (1970).

[31] *See* Owatonna Manufacturing Co. v. Melroe Co., 301 F. Supp. 1296, 1305-1306 (D. Minn. 1969).

CONCLUSION

The refusal of the Hopi Tribal Council to participate voluntarily in this litigation must not be allowed to deprive the plaintiffs of their day in court. That would make the Council a law unto themselves. That would certainly be "an impotent outcome to negotiations . . . which seemed to promise more, and give the word of the nation for more." *United States* v. *Winans*, 198 U.S. 371, 380 (1905).

The Hopi Tribe is not an indispensable party in this litigation. The plaintiffs' motion to join the Hopi Tribal Council should have been granted. Sovereign immunity is not a defense to an action challenging alleged *ultra vires* actions of governmental officials. The decisions below are inconsistent with four decisions of this Court and create three conflicts with decisions of other circuits. For all of these reasons, the petition for a writ of certiorari should and must be granted and the decision below reversed.

In view of the multiple egregious errors of the court of appeals, petitioners respectfully suggest the appropriateness of granting the petition and remanding the case for reconsideration in light of:

1. *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350 (1940);
2. *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968);
3. *Heckman* v. *United States*, 224 U.S. 413 (1912);
4. *Ex Parte Republic of Peru*, 318 U.S. 578, 587-588, 589 (1943);

5. *Littell* v. *Morton,* 445 F.2d 1207 (4th Cir. 1971); and

6. *Means* v. *Wilson,* 522 F.2d 833 (8th Cir. 1975).

Respectfully submitted,

ROBERT S. PELCYGER
JOHN E. ECHOHAWK
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

Counsel for Petitioners

December 15, 1975

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75- 75-8441

EMERSON SUSENKEWA, ET AL., *Petitioners,*

v.

THOMAS S. KLEPPE, Secretary of the Interior, ET AL., *Respondents.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. PELCYGER
JOHN E. ECHOHAWK
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
303/447-8760

Counsel for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

Opinion of the Court of Appeals 1a

Order Denying Petition for Rehearing 6a

District Court's Order of Dismissal 7a

Complaint 10a

Ex. A.—Statement of Hopi Religious Leaders ... 26a

Ex. B.—Constitution and By-Laws of the Hopi Indians 30a

Ex. C.—Memorandum dated December 14, 1937 from the Solicitor to the Commissioner of Indian Affairs 49a

Memorandum dated August 28, 1936 to Commissioner of Indian Affairs from Oliver LaFarge 52a

Memorandum dated May 23, 1960 from Assistant Solicitor, Indian Legal Activities to Commissioner of Indian Affairs 61a

Letter dated May 24, 1961 from the Assistant Secretary of the Interior to Area Director of the Bureau of Indian Affairs in Phoenix, Arizona 63a

Letter dated November 18, 1964 from the Secretary of the Interior to the Area Director of the Bureau of Indian Affairs in Phoenix, Arizona 64a

Letter dated August 12, 1966 from the Assistant Secretary of the Interior to the Area Director of the Bureau of Indian Affairs in Phoenix, Arizona ... 66a

Motion to Join United States and Hopi Tribal Council as Parties 67a

Motion to Join Navajo Tribe as a Party, or, in the alternative, to give notice of the pendency of this action to the Navajo Tribe 69a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-

EMERSON SUSENKEWA, ET AL., *Petitioners,*

v.

THOMAS S. KLEPPE, Secretary of the Interior, ET AL., *Respondents.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Court of Appeals
For the Ninth Circuit

No. 73-2132

STARLIE LOMAYAKTEWA, ET AL., *Plaintiffs-Appellants,*

vs.

STANLEY K. HATHAWAY, ET AL., *Defendants-Appellees,*

and

ARIZONA PUBLIC SERVICE COMPANY, ET AL., *Intervenors-Appellees.*

OPINION

[JULY 25, 1975]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Before: BROWNING and DUNAWAY, *Circuit Judget,* and ORRICK,* *District Judge*

ORRICK, *District Judge:*

On June 6, 1966, the Hopi Tribe of Arizona leased to the Peabody Coal Company's predecessor in interest a strip of land for a term of ten years. The land, known as the Black Mesa, was owned jointly with the Navajo Indian Tribe.[1]

Appellants, "Kikmongwis" or village leaders of the "traditional Hopi"[2] (i.e., spiritualistic) faction, who brought this action in 1971 to void the lease, appeal from an order of the District Court of Arizona dismissing the action for the failure of appellants to join either the Hopi Tribe, the Navajo Tribe, or the United States as indispensable parties. For the reasons hereinbelow set forth, we affirm the order of the District Court dismissing the action.

At the heart of the controversy is the question whether the Hopi Tribe, the Navajo Tribe and the United States, or any of them, is an indispensable party to this action to cancel the lease under Rule 19(b) of the Federal Rules of Civil Procedure. Inasmuch as we hold that the Hopi Tribe, as lessor, is an indispensable party to the action and cannot be joined because of its sovereign immunity, we need not reach the question whether the Navajo Tribe and/or the United States are indispensable parties, nor whether their sovereign immunity attaches and prevents them from being joined in the event that they are determined to be indispensable parties to the lawsuit.

---

* Honorable William H. Orrick, Jr., United States District Judge, Northern District of California, sitting by designation.

[1] Peabody's predecessor in interest executed a similar lease in June, 1966, with the Navajo Indian Tribe.

[2] They number 62 of a tribe of more than 5,000 Hopi Indians. Prior to oral argument Starlie Lomayaktewa dismissed his appeal.

I.

No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable. *Broussard* v. *Columbia Gulf Transmission Company*, 398 F.2d 885 (5th Cir. 1968); *Keegan* v. *Humble Oil & Refining Co.*, 155 F.2d 971 (5th Cir. 1946); *Tucker* v. *National Linen Service Corp.*, 200 F.2d 858 (5th Cir. 1953).

This principle declared by the Supreme Court more than a century ago in *Shields* v. *Barrow*, 17 How. 129 (1854), is codified in Rule 19 of the Federal Rules of Civil Procedure in pertinent part as follows:

> "(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
>
> (b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall

determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoiner.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined."

Thus, under Rule 19(a), we determine whether or not it is feasible to join the Hopi Indian Tribe, and under Rule 19(b) we apply the standards as to whether or not the Tribe is an indispensable party.

At the outset it should be noted that the Hopi Tribe, as a dependent, political, quasi-sovereign nation (*Groundhog* v. *Keeler,* 442 F.2d 674, 678 (10th Cir. 1971)), enjoys sovereign immunity and cannot be sued without its consent or the consent of the Congress. *Turner* v. *United States,* 248 U.S. 354, 358 (1919); *United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512 (1940). In the case at bar, the plaintiffs, the traditional Hopis, have never suggested that Congress or the Hopi Tribe has consented to this suit against the Tribe. So, if it is determined that the Hopi Tribe is an indispensable party, the suit terminates because it cannot be sued without its consent, which it has not given.

We turn now to a consideration of the standards set forth in Rule 19(b) as to whether the Hopi Tribe is an indispensable party.

The first three factors to be considered by the Court in the application of Rule 19 all relate to the nature of the judgment which would be granted in the absence of the alleged indispensable party. The Court must consider first whether a person's absence might be prejudicial to him; second, the extent to which such prejudice can be lessened or avoided; and, third, whether a judgment rendered in the person's absence will be adequate. It seems perfectly obvious that a judgment rendered in the absence of the Hopi Tribe most surely would be prejudicial to it, for the royalties to be paid under the lease still amount to more than $20 million and cancellation of the lease would eliminate the employment of many of the Hopis. Furthermore, those who are already parties to this litigation will find themselves saddled with an obligation to make royalty payments under the lease notwithstanding the fact that as to them the lease has been held invalid so that they are not entitled to any benefits under it.

The second factor, "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided", is simply not present in this case. The traditional Hopi are attempting to deprive the Hopi Tribe of benefits under the lease on the order of tens of millions of dollars. They are attempting to do so in the absence of the Tribe. There is, thus, no way that the prejudice to the Tribe "can be lessened or avoided" by protective provisions in the judgment shaping relief or, indeed, any other measure.

The third factor is "whether a judgment rendered in the person's absence will be adequate". It is perfectly apparent that any judgment rendered in the Tribe's absence would not be adequate. The lease under attack is between the Hopi Tribe, as lessor, and the Peabody Coal Company,

as assignee of the original lease. The Peabody Coal Company has been joined as a party defendant whereas the Hopi Tribe has not. The adverse effects of the invalidation of the lease will be visited upon the Hopi Tribe.

Finally, the fourth factor, "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder" is a factor weighing in the favor of the plaintiffs. If the Tribe is held to be an indispensable party, it still cannot be brought into the action by reason of its sovereign immunity, and the plaintiff thus does not have any forum to which it can resort in such event.

Thus, it becomes the duty of the Court to weigh the four prescribed factors and to make a judgment balancing the respective interests. Here, it seems to us, that the adverse effects of a cancellation of the lease on the Hopi Tribe far outweigh the adverse effects visited upon the 62 dissident traditional Hopis by reason of the failure to provide another forum for them.

The judgment of the District Court is *affirmed.*

ORDER DENYING PETITION FOR REHEARING

[FILED SEPTEMBER 18, 1975]

Before: BROWNING and DUNAWAY, Circuit Judges, and ORRICK*, District Judge.

The panel, having duly considered appellants' Petition for Rehearing and being fully advised in the premises, concludes that the petition should be denied.

IT IS SO ORDERED.

---

* Honorable William H. Orrick, Jr., United States District Judge, Northern District of California, sitting by designation.

In the United States District Court
For the District of Arizona

No. Civ-72-106 Pct WEC

STARLIE LOMAYAKTEWA, ET AL., *Plaintiffs,*

vs.

ROGERS C. B. MORTON, individually, and in his capacity as Secretary of the Interior of the United States, and PEABODY COAL COMPANY, *Defendants.*

DEPARTMENT OF WATER & POWER OF LOS ANGELES, SOUTHERN CALIFORNIA EDISON COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ARIZONA PUBLIC SERVICE COMPANY, TUCSON GAS AND ELECTRIC COMPANY, NEVADA POWER COMPANY, *Intervenor Defendants.*

ORDER OF DISMISSAL

[FEBRUARY 16, 1973]

The above entitled cause came on for hearing before the Court upon the motion of the defendant Peabody Coal Company for dismissal for failure to join indispensable parties, which motion was joined in by the intervenors, and for hearing upon plaintiffs' motion to join the United States, the Hopi Tribal Council, the Navajo Tribe, and in the alternative as to the latter, to give notice of the pendency of the action. The United States of America, the Hopi Tribe and the Navajor Tribe each enjoys sovereign immunity. *See U. S.* v. *USF&G Co.*, 309 U.S. 506; *Groundhog* v. *Keeler*, 442 F.2d 674; *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529; *Green* v. *Wilson*, 331 F.2d 769.

Several criteria are stated in Rule 19, Federal Rules of Civil Procedure, as amended.

Under the first criterion, the question posed would be whether a judgment in the Hopis' absence would be prejudicial to them. The answer is clearly in the affirmative.

The second criterion poses the question, to what extent would this prejudice be lessened or avoided by protective provision in the judgment by the shaping of relief or other measures? In the instant case, because of the nature of the thrust of the plaintiffs' complaint, there is no way of protecting the Hopis in any judgment or in the shaping of relief, or by way of any other measure.

The third criterion poses the question, could a judgment rendered in the Hopis' absence be an adequate one? The answer is clearly in the negative. A judgment directed against the Secretary of the Interior might be harmful to the Secretary, but it would also extinguish the Hopis' interest.

The final criterion poses the question, would the plaintiff have an adequate remedy if the case were to be dismissed? The answer is also in the negative. Plaintiffs apparently assert that, if the sovereign immunity invoked here bars the inclusion of an indispensable party, then this criterion should become paramount, and the case should proceed without the parties in any event. This Court is of the opinion that this form of argument would contravene the established doctrine of indispensability in a manner not intended by the revision. *See* 3A, Moore's Federal Practice, 2262 and 2263. *See also, Franz* v. *East Columbia Basin Irrigation District*, 383 F.2d 391; *Shaw* v. *Udall*, 264 F.Supp. 390. This case is similar in character to *Lomayaktewa* v. *Kerr-McGee*, decided by this Court in 1965 in Civ-955 Pct. *See also, Yazzie* v. *Morton*, also decided in this Court, designated as Civ-71-601.

The plaintiffs' reliance on *Davis* v. *Morton*, decided by the Tenth Circuit November 24, 1972, cause No. Civ-72-124, is misplaced. The record in this case indicates that a period

of five years has elapsed between the lease in issue and the institution of this action by the plaintiffs. The record indicates that substantial moneys have been expended in the implementation of the lease. It would, therefore, appear that were the action not to be dismissed for failure to join indispensable parties, the action should be dismissed because of the laches of the plaintiffs.

WHEREFORE, the motion of the defendant Peabody Coal Company, in which the intervenors join to dismiss for failure to join indispensable parties is granted.

The motion of the plaintiffs to join the United States and the Hopi Tribal Council as parties defendant is denied.

The plaintiffs' motion to join the Navajo Tribe as party defendant, or in the alternative to give notice of the pendency of this action to the Navajo Tribe is denied.

Costs of suit are assessed against plaintiffs upon the filing of an appropriate cost bill by defendants.

DATED this 15th day of February, 1973.

/s/ WALTER E. CRAIG
United States District Judge

United States District Court
District of Columbia

STARLIE LOMAYAKTEWA; EMERSON SUSENKEWA; GUY KALCHAFTEWA; TOM HUMEYESTEWA; NEILSON HONYAKTEWA; NORMAN YOYHOMA; HASTINGS HUMIWAITEWA; CORTEZ LOMAHOKLAH;
Village of Mishongnovi
Second Mesa, Arizona

CLAUDE KEWANYAMA; DAVID KEVAMA; RALPH SELINA; CHARLES LOMAKEMA; CYRUS N. JOSYTEWA; AUGUSTINE MOWA; OTIS POLELONEMA; BYRON TYMER; TAYLOR WAZZIE; EVELYN PELA; EARL PELA; HERBERT TALAHAFTEWA;
Village of Shungopavi
Second Mesa, Arizona

NED LOMAYESTEWA;
Village of Sipaulavi
Second Mesa, Arizona

MINA LANSA; JOHN LANSA;
Oraibi, Arizona 86039

KING POLEYESTEWA; HARRY MASAYUMPTEWA; IRA PUHUYWTEWA; JULIUS CALNIMPTEWA; MIKE GASHWAZRA;
Oraibi, Arizona 86039

NICHOLAS QUOMAHU;
Oraibi, Arizona 86039

THOMAS BANYACYA, SR.;
Oraibi, Arizona 86039

LOUISE SMITH; CECIL CALNIMPTEWA; HENRY HEEMETEWA; LOGAN LOMA; JACKSON TEWA; ELI SELESTEWA; JAMES PONYAH; AMELIA HOLMES; DAISY M. ALBERT;
Moencopi, Arizona

MELVIN TEWA;
Farmington, New Mexico 87401

DAN K. EVEHEMA; JACK PONGAYESVIA; LEWIS K. NAHA; DAVID MONONGYE; MADGELINA QUANIMPTEWA; STANLEY DASH; NELSON KURSGORWA; EARL TALAHONGUA; AMOS HOWESA; HUGH G. POLEYUMPTEWA; HAYUNGAWA SILAS, SR.; LESTER QUANIMPTEWA;
Hotevilla, Arizona

WILSON TALASHOMA; DAVID CALNIMPTEWA;
Village of Bacabi
Hotevilla, Arizona

NED NAYATEWA; EARL MUMZEWA; GIBSON NAMOKI; STEWART TUVINAGHTEWA; PRESTON NAKALA; WOODROW PRESTON; FRANK CHAPPELLA;
Polacca, Arizona 86042

CARLOTTA SHATTUCK;
Polacca, Arizona 86042
Plaintiffs,

v.

ROGERS C. B. MORTON, individually and in his capacity as Secretary of the Interior of the United States; and PEABODY COAL COMPANY,
1775 K Street, N.W.,
Washington, D.C.
Defendants.

Civil No. 974-71

COMPLAINT FOR DECLARATORY RELIEF AND TO SET ASIDE AGENCY ACTION

1. This is an action to declare invalid and to set aside as unlawful the Secretary of Interior's approval of a lease of Hopi Indian lands on Black Mesa for strip mining purposes. The Peabody Coal Company is now conducting strip mining operations on large sections of Hopi lands on Black Mesa pursuant to this lease. The Secretary of Interior's approval of this strip mining lease was in-

valid and is of no force and effect because the lease approval was without observance of procedures required by law, in excess of the Secretary's statutory authority, and in violation of his specific obligations and undertakings to the plaintiffs.

2. Black Mesa lands have unique and special significance in Hopi religion and culture and to the plaintiffs. The plaintiffs consider themselves the stewards of their ancestral lands of which Black Mesa is the heart. Their religious mission is to preserve their lands which are at the spiritual center of the universe. It is prophesied that if their lands are ruined, the world will end. Carving up Black Mesa by the process known as strip mining is a desecration, a sacrilege, contrary to the instructions of the Great Spirit and to the essential relationship to the land that is embodied in Hopi culture, life and religion; contrary, in short, to everything that Hopi culture and religion mean. The statement of the Hopi religious chiefs, attached hereto as Exhibit A and incorporated in this Complaint as if set forth here in full, explains the place, significance and meaning of Black Mesa to the plaintiffs and in the Hopi religion.

3. The jurisdiction of this court is based on:

a. 5 U.S.C. §§ 701-06 (Administrative Procedure Act);

b. 28 U.S.C. § 1331 (Federal Question);

c. 28 U.S.C. § 1332 (Diversity of Citizenship);

d. 28 U.S.C. § 1337 (Commerce Clause);

e. 11 D. C. Code §521.

4. The amount in controversy in this case exceeds $10,000, exclusive of interest and costs. Plaintiffs have no adequate remedy at law, and are suffering, and will continue to suffer, irreparable injury unless the relief requested is granted by this court.

5. Plaintiffs are Hopi Indians who live in the Hopi villages which are situated on lands that the Hopi people have occupied from time immemorial. Plaintiffs are traditional Hopi Indians in that they believe in and accept the religion, beliefs, customs and values that have been associated with the Hopi people from time immemorial.

6. By Executive Order dated December 16, 1882, the Federal Government of the United States set aside, without authorization from or approval by the Hopi people, a portion of Hopi ancestral lands for the Hopi Indians for the purposes of preserving and perpetuating the Hopi way of life and providing a permanent home and abiding place for the Hopi people. The Hopi lands thus set aside are located in the Southwestern part of the United States, in what is now known as the State of Arizona.

7. Black Mesa is a high plateau arising on the northern edge of the Executive Order reservation and sloping gradually southward to the Hopi villages. Altitudes on the mesa range from slightly over 800 feet to approximately 6,000 feet. Mixed grasslands and forests cover the central basin, with aspen, juniper and pinion dotting the basin rim. Most of Black Mesa is deemed by the United States and by the Defendant Secretary of the Interior, to be jointly owned by the Hopi and Navajo Indian Tribes.

8. On or about October 23, 1966, the Secretary of the Interior approved a purported lease agreement (hereinafter the "Black Mesa strip mining lease") between the Sentry Royalty Company and the Hopi Tribe of Indians pursuant to which certain lands within the so-called Hopi-Navajo joint use area of Black Mesa are leased to the Sentry Royalty Company for the purpose of strip mining the coal deposits underlying the land. One Dewey Healing, who purported to be acting as Tribal Chairman of the Hopi Indians Tribal Council, signed said lease allegedly on behalf of the Hopi Tribe of Indians, pursuant to authority allegedly granted by the Hopi Tribal Council.

9. This action is brought pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Administrative Procedure Act, 5 U.S.C. §§ 701-06, to declare invalid and to set aside as unlawful, the Secretary of the Interior's approval of the Black Mesa strip mining lease. The approval is invalid and must be set aside because the Hopi Tribal Council has no authority to lease Hopi Indian lands and because the Hopi Tribal Council that authorized the lease was not properly constituted and for other reasons set forth in this Complaint.

10. Plaintiffs are all Hopi Indians.

11. Plaintiff Starlie Lomayaktewa of the village of Mishongnovi is the Kikmongwi (traditional chief) of the village of Mishongnovi on Second Mesa. He has been the Kikmongwi since February, 1950. Plaintiffs Emerson Susunkewa, Guy Kalehaftewa, Tom Humeyestewa, Neilson Honyaktewa, Norman Yoyhoma, Hastings Humiwaitewa and Cortez Lomahoklah are religious leaders of the village of Mishongnovi.

12. Plaintiff Claude Kewanyama of the village of Shungopavi is the Kikmongwi (traditional chief) of the villages of Shungopavi and Sipaulovi on Second Mesa. He has been the Kikmongwi since September, 1952. Plaintiffs David Kevama, Ralph Selina, Charles Lomakema, Cyrus N. Josytewa, Augustine Mowa, Otis Polelonema, Byron Tymer, Evelyn Pela, Taylor Wazzie and Earl Pela are religious leaders of the village of Shungopavi, and Plaintiff Herbert Talahaftewa is a member of the village of Shungopavi. Plaintiff Ned Lomayestewa is a religious leader of the village of Sipaulavi.

13. Plaintiff Mina Lansa of the village of Oraibi is the Kikmongwi (traditional chief) of the villages of Oraibi and Kyakotsmovi (New Oraibi) on Third Mesa and the Lower District of the village of Moenkopi. She has been the Kikmongwi since August, 1964. Plaintiffs John Lansa,

Ira Puhuywtewa, Mike Gashwazra and Julius Calnimptewa are religious leaders of the village of Oraibi, and plaintiffs King Poleyestewa and Harry Masayumptewa are members of the village of Oraibi. Plaintiff Nicholas Quomahu is a religious leader of the village of Kyakotsmovi, and plaintiff Thomas Banyacya, Sr. is a member of the village of Kyakotsmovi. Plaintiffs Louise Smith, Melvin Tewa, Cecil Calnimptewa, Henry Heemetewa, Logan Loma, Jackson Tewa, Eli Selestewa, and James Ponyah are members of the Lower District of the village of Moenkopi.

14. Plaintiffs Dan K. Evehema, Jack Pongayesvia, Lewis K. Naha, David Monongye, Madgelina Quanimptewa, Stanley Dash, Nelson Kursgorwa, and Lester Quanimptewa are religious leaders of the village of Hotevilla, which has been without a recognized Kikmongwi since 1946 or 1947. Together these religious leaders perform the duties of the Kikmongwi, until one of them may or will come to be recognized as the Kikmongwi. Plaintiffs Earl Talahongua, Amos Howesa, Hugh G. Poleyumptewa and Hayungawa Silas, Sr. are members of the village of Hotevilla.

15. Plaintiff Ned Nayatewa, of the village of Walpi, is the Kikmongwi (traditional chief) of the consolidated villages of First Mesa composed of the villages of Walpi, Shitchumovi, and Tewa. He has been the Kikmongwi since May, 1966. Plaintiffs Earl Mumzewa, Gibson Namoki, Stewart Tuvinaghtewa and Preston Nakala are religious leaders of the villages of Walpi and Shitchumovi and plaintiffs Carlotta Shattuck and Woodrow Preston are members of the villages of Walpi and Shitchumovi. Plaintiff Frank Chappella is the Tewa leader of the village of Tewa.

16. Plaintiffs Amelia Holmes and Daisy M. Albert are members of the Upper District of the village of Moenkopi.

17. Plaintiff Wilson Talashoma and David Calnimptewa are members of the village of Bakabi.

18. Defendant Rogers C. B. Morton is the Secretary of the Department of the Interior and as such is the principal officer of the Government charged with responsibility for fulfilling the trust obligation to the plaintiffs and their lands and administering the laws relating to Indian affairs.

19. Defendant Peabody Coal Company, a Delaware corporation, is a wholly-owned subsidiary of the Kennecott Copper Company. Pursuant to an assignment of the Black Mesa strip mining lease executed on or about February 5, 1968, and approved by the agent of the Secretary of the Interior on or about February 8, 1968, the Peabody Coal Company is the successor in interest to the Sentry Royalty Company and is now occupying, possessing and conducting strip mining operations on the so-called Hopi-Navajo joint use area of Black Mesa. The Peabody Coal Company transacts business in the District of Columbia and is so situated with respect to this action that the disposition of this action may, as a practical matter, impair or impede its ability to protect its interests.

19. From time immemorial the Hopi Indians have occupied, in addition to other lands outside the present state of Arizona, the lands in and around Black Mesa, First Mesa, Second Mesa, Third Mesa and Moenkopi Wash in the present state of Arizona. Traditionally, the Hopi Indians have settled in separate villages with each village autonomous and self-governing within the limits imposed by the Hopi clan structure and traditional beliefs and values. There was no central governing authority or entity representing the Hopi Tribe as such. Nor was there any inter-village authority corresponding to what is now known as the Hopi Tribal Council prior to 1936.

20. In 1936, a Constitution and By-Laws was imposed on the Hopi Tribe although this Constitution and By-Laws is alien to the Hopi tradition and has been opposed by the Hopi Indians committed to the traditional way of life.

Nevertheless, the Constitution and By-Laws provides certain safeguards for protecting and preserving traditional Hopi religion, culture, and way of life. A copy of said Constitution and By-Laws are attached as Exhibit B.

21. In particular, the following provisions of the Hopi Constitution and By-Laws are specifically designed to insure that the Hopi Tribal Council does not act in a manner contrary to traditional Hopi culture and religion:

PREAMBLE

This Constitution, to be known as the Constitution and By-Laws of the Hopi Tribe, is adopted by the self-governing Hopi and Tewa villages of Arizona to provide a way of working together for peace and agreement between the villages, and of preserving the good things of Hopi life, and to provide a way of organizing to deal with modern problems, with the United States Government and with the outside world generally.

* * *

ARTICLE III—ORGANIZATION

SEC. 3 Each village shall decide for itself how it shall be organized. Until a village shall decide to organize in another manner, it shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its leader.

SEC. 4 Any village which does not possess the traditional Hopi self-government, or which wishes to make a change in that government or add something to it, may adopt a village Constitution in the following manner: A Constitution, consistent with this Constitution and By-Laws, shall be drawn up, and made known to all the voting members of such village, and a copy shall be given to the Superintendent of the Hopi jurisdiction. Upon the request of the Kikmongwi of such village, or of 25% of the voting members thereof, for an election on such Constitution, the Superintendent shall make sure that all members have had ample opopportunity to study the proposed Constitution. He shall then call a special meeting of the voting members

of such village, for the purpose of voting on the adoption of the proposed Constitution, and shall see that there is a fair vote. If at such referendum, not less than half of the voting members of the village cast their votes, and if a majority of those voting accepts the proposed Constitution, it shall then become the Constitution of that village, and only officials chosen according to its provisions shall be recognized.

The village Constitution shall clearly say how the Council representatives and other village officials shall be chosen, as well as the official who shall perform the duties placed upon the Kikmongwi in this Constitution. Such village Constitution may be amended or abolished in the same manner as provided for its adoption.

ARTICLE VI—
POWERS OF THE TRIBAL COUNCIL

SECTION 1. The Hopi Tribal Council shall have the following powers. . . .

(k) to protect the arts, crafts, traditions and ceremonies of the Hopi Indians.

* * *

ARTICLE VII—LAND

SECTION 1. Assignment of use of farming land within the traditional clan holdings of the villages of First Mesa, Mishongnovi, Sipaulavi, and Shungopavi, and within the established village holdings of the villages of Kyakotsmovi, Bakabi, Oraibi, Hotevilla, and Moenkopi, as in effect at the time of approval of this Constitution, shall be made by each village according to its established custom, or such rules as it may lay down under a Constitution adopted according to the provisions of Article III, Section 4.

* * *

ARTICLE IX—BILL OF RIGHTS

SEC. 2 All members of the Tribe shall be free to worship in their own way, to speak and write their opinion, and to meet together.

* * *

BY-LAWS OF THE HOPI TRIBE

ARTICLE IV—
EAGLE HUNTING TERRITORIES AND SHRINES

The Tribal Council shall negotiate with the United States Government agencies concerned, and with other tribes and other persons concerned in order to secure protection of the right of the Hopi Tribe to hunt for eagles in its traditional territories, and to secure adequate protection for its outlying, established shrines.

22. The Secretary of the Interior has approved the Constitution and By-Laws of the Hopi Tribe and recognizes that its provisions are binding upon the Hopi Tribal Council and the Department of the Interior. By approving and recognizing the Constitution and By-Laws of the Hopi Tribe, the Secretary of the Interior has assumed certain specific obligations to the plaintiffs. The Secretary is required by law to insure that the Hopi Tribal Council operates in the manner, and within the restrictions, specified in and imposed by the Constitution and By-Laws.

23. An actual controversy exists between the parties because the plaintiffs contend that the Black Mesa strip mining lease is invalid and must be set aside for the reasons set forth in the following causes of action. The defendants maintain that the Black Mesa strip mining lease is valid and binding.

FIRST CAUSE OF ACTION

24. The powers of the Hopi Tribal Council are strictly and severely limited by the Hopi Constitution. In the words of a 1937 memorandum opinion of the Solicitor of the Department of the Interior disapproving an ordinance adopted by the Hopi Tribal Council, "The enumerated powers of the Tribal Council were to be as close to the legal minimum as possible." A copy of this Solicitor's memorandum is attached to this complaint as Exhibit C.

25. Throughout the long period of their use, enjoyment and occupation of their ancestral lands in and around First Mesa, Second Mesa, Third Mesa, Black Mesa and Moenkopi Wash, the Hopi people have continually used their ancestral lands outside of their village holdings for many vital purposes including stock grazing, firewood, building timber and coal and as sacred ceremonial shrines of two kinds, Kachina shrines and eagle shrines. The Hopis' right of access to all of the lands included within the 1882 Executive Order for these and other purposes has never been questioned and has always been respected by the Secretary of the Interior. The Hopi way of life is so dependent upon the physical and spiritual significance of the Hopi lands both within and outside the village holdings that it is unthinkable to traditional Hopis that any Hopi or group of Hopis could have authority to dispose of Hopi land to non-Hopis and thereby deprive Hopis of unquestioned rights they have enjoyed for centuries. If the Hopi lands go, Hopi culture and religion will be destroyed.

26. Article VI of the Hopi Constitution is entitled Powers of the Tribal Council. Section 1(c) of Article VI provides:

> SECTION 1. The Hopi Tribal Council shall have the following powers which the Tribe now has under existing law or which have been given to the Tribe by the Act of June 18, 1934. The Tribal Council shall exercise these powers subject to the terms of this Constitution and to the Constitution and Statutes of the United States. . . .
>
> (c) To prevent the sale, disposition, lease or encumbrance of tribal lands, or other tribal property.

27. Article VII, Section 1 of the Hopi Constitution provides in part:

> Unoccupied land beyond the clan and village holdings mentioned shall be open to the use of any member of the Tribe, under the supervision of the Tribal Council.

28. The Hopi Constitution purports to confer on the Hopi Tribal Council the power and authority to *prevent* the lease of Hopi lands, and to authorize the use *by members of the Hopi Tribe* of the so-called unoccupied land beyond the clan and village holdings, but the power to dispose of or lease Hopi lands to non-Hopis was specifically withheld from the Hopi Tribal Council. Under no circumstances does the Tribal Council have the authority to lease or dispose of Hopi lands that have religious and cultural value and significance to the Hopi people.

29. The approval by the Secretary of the Interior of the Black Mesa strip mining lease is unlawful and must be set aside because said approval was in excess of the Secretary's statutory jurisdiction and authority and without observance of procedures required by law. The Hopi Tribal Council did not have the power or authority to enter into the Black Mesa strip mining lease. The Secretary of the Interior is prohibited by law from approving any action of the Hopi Tribal Council which exceeds the powers and authority conferred on the Hopi Tribal Council by the Hopi Constitution.

SECOND CAUSE OF ACTION

30. Article IV, Section 4 of the Hopi Constitution specifically provides that "representatives shall be recognized by the Council only if they are certified by the Kikmongwi of their respective villages. Certifications may be made in writing or in person."

31. When the Black Mesa strip mining lease was purportedly approved by the Hopi Tribal Council on May 16, 1966, there were eighteen (18) seats on the Council. Seven (7) of those seats were vacant. The remaining eleven seats were purportedly occupied by the following persons from the designated villages:

Dewey Healing (Chairman)	First Mesa
Robert Sakiestewa (Vice-Chairman)	Upper Moencopi
Clifford Honahni	Upper Moencopi
Stanley Dashee	First Mesa
Jaynes Polacca	First Mesa
Logan Koopee	First Mesa
Thomas Balenquah	Bakabi
Don Talayesva	Oraibi
Abbott Sekaquaptewa	Kyakotsmovi (New Oraibi)
Homer Cooyama	Kyakotsmovi (New Oraibi)
Earl Adams, Sr.	Sipaulavi

32. No one purported to fill the seven seats allocated under the Hopi Constitution to the following villages: Mishongnovi—2; Shungopavi—2; Hotevilla—2; and Lower Moenkopi—1. These seven seats were vacant in 1966 and for a substantial period prior to 1966 and remain vacant at this time.

33. Of the eleven seats that were purportedly occupied, a total of six representatives from the villages of First Mesa (4) and Upper Moenkopi (2), were apparently certified to the Tribal Council in accordance with the procedures specified in the Hopi Constitution.

34. Five members of the Hopi Tribal Council at the time the Black Mesa strip mining lease was approved were not certified in accordance with the procedures specified in, and mandated by, the Hopi Constitution. The five delegates that purported to represent the villages of Bakabi (1), Oraibi (1), Kyakotsmovi (New Oraibi) (2) and Sipaulavi (1) were not certified, and had never been certified, in person or in writing, by the Kikmongwi of their respec-

tive villages. Unlike Upper Moenkopi, the villages of Bakabi, Oraibi, Kyakotsmovi (New Oraibi) and Sipaulavi had not (and still have not) adopted a written village Constitution to take the place of the traditional form of government, as provided in Article III, Section 4 of the Hopi Constitution. In the absence of such a written village Constitution, the village must be considered as being under the traditional Hopi organization, and the Kikmongwi of the village must be recognized as its leader by the Secretary of the Interior as provided in Article III, Section 3 of the Hopi Constitution.

35. Article IV, Section 6 of the Hopi Constitution provides: "No business shall be done unless at least a majority of the members are present."

36. When the Black Mesa strip mining lease was approved by the Hopi Tribal Council on May 16, 1966, a majority of the members was not present. Only six (6) representatives to the Tribal Council, including the Chairman, out of a total of eighteen (18), were properly seated in the Tribal Council. The business that was allegedly done at the May 16, 1966 Tribal Council meeting was then, and is now, of absolutely no force and effect.

37. The approval of the Secretary of the Interior of the Black Mesa strip mining lease is unlawful and must be set aside because said approval was in excess of the Secretary's jurisdiction and authority and without observance of procedures required by law. The Secretary of the Interior is bound to follow the Constitution and By-Laws of the Hopi Tribe and is not authorized or permitted to approve any action of the Hopi Tribal Council that was not taken in accordance with the Hopi Constitution and By-Laws. In purporting to approve the Black Mesa strip mining lease, the Secretary of the Interior exceeded his authority by approving business transacted by the Hopi Tribal Council when less than a majority of the members was present in violation of the Hopi Constitution and By-Laws.

THIRD CAUSE OF ACTION

38. The strip mining of Black Mesa violates the most sacred elements of traditional Hopi religion, culture and way of life. The quality of Hopi life is being taken away in spite of and contrary to the specific guarantees to the plaintiffs by the Secretary of the Interior that the Hopi traditional religious chiefs, the Kikmongwis, would have power to preserve the essence of Hopi life. As a result of the Secretary of the Interior's wrongful and illegal approval of the Black Mesa strip mining lease and of the Peabody Coal Company's strip mining operations on sacred Hopi lands, the plaintiffs are being harmed in a way that will never be, and can never be, repaired.

39. The Secretary of the Interior has engaged in a pattern and practice of discriminating against the traditional Hopi people and in favor of other factions. The Secretary has acted in violation of his fiduciary, contractual and constitutional (both Federal and Hopi) obligations to the plaintiffs to preserve and protect and do everything possible to insure the survival of traditional Hopi culture, religion and way of life. In favoring elements of the Hopi Tribe opposed to the traditional leaders and in making it possible for these elements to control the Hopi Tribal Council, the Secretary has denied the plaintiffs due process of law and equal protection of the laws, and has discriminated against them on the basis of their religious beliefs. By these wrongful and illegal acts of favoritism and discrimination, the Secretary of the Interior and his agents have arbitrarily and capriciously interfered with the internal affairs of the Hopi Tribe, thereby making it possible for the Black Mesa strip mining lease to be executed and approved.

40. The Bureau of Reclamation, which is under the jurisdiction of the Secretary of the Interior, will be a major beneficiary of the coal mined from Black Mesa. Black Mesa coal will be burned to generate electric power at the pro-

posed Navajo power plant at Page, Arizona. The Bureau of Reclamation will purchase the largest part of the power generated at the Page plant, more than twenty-three percent. Thus, in approving the Black Mesa strip mining lease and purchasing the electric power generated by the burning of Black Mesa coal, the Secretary of the Interior is both the seller and buyer of the coal mined at Black Mesa. This conduct is arbitrary, capricious, a violation of fiduciary obligations and constitutes an abuse of discretion in that it constitutes both self-dealing and conflict of interest on the part of the trustee.

41. For the reasons alleged in the proceeding paragraphs, the Secretary of the Interior's approval of the Black Mesa strip mining lease is unlawful, arbitrary, capricious and an abuse of discretion, contrary to the plaintiff's constitutional rights, privileges and immunities and without observance of procedure required by law.

WHEREFORE, plaintiffs pray that this Court:

1. Declare that the Secretary of the Interior's approval of the Black Mesa strip mining lease is unlawful;

2. Set aside the Secretary of the Interior's approval of the Black Mesa strip mining lease; and

3. Grant costs of suit and such other relief as may be proper.

DATED at Washington, D.C., May 14, 1971.

ROBERT S. PELCYGER
BRUCE R. GREENE
DAVID H. GETCHES
Native American Rights Fund
P.O. Box 1868
1080 W. Washington Avenue
Escondido, California 92025
(714) 746-8941

/s/ by ROBERT S. PELCYGER
Attorneys for Plaintiffs

BERLIN, ROISMAN AND KESSLER
1910 N Street, N.W.
Washington, D.C. 20036
(202) 293-5764

/s/ by EDWARD BERLIN
Attorneys for Plaintiffs

Exhibit A

STATEMENT OF HOPI RELIGIOUS LEADERS

Hopi land is held in trust in a spiritual way for the Great Spirit, Massau'u. Sacred Hopi ruins are planted all over the Four Corners area, including Black Mesa. This land is like the sacred inner chamber of a church—our Jerusalem.

The area we call "Tukunavi" (which includes Black Mesa) is part of the heart of our Mother Earth. Within this heart, the Hopi has left his seal by leaving religious items and clan markings and plantings and ancient burial grounds as his landmarks and shrines and as his directions to others that the land is his. The ruins are the Hopi's landmark. Only the Hopi will know what is here for him to identify—others will not know.

This land was granted to the Hopi by a power greater than man can explain. Title is invested in the whole makeup of Hopi life. Everything is dependent on it. The land is sacred and if the land is abused, the sacredness of Hopi life will disappear and all other life as well.

The Great Spirit has told the Hopi Leaders that the great wealth and resources beneath the lands at Black

Mesa must not be disturbed or taken out until after purification when mankind will know how to live in harmony among themselves and with nature. The Hopi were given special guidance in caring for our sacred lands so as not to disrupt the fragile harmony that holds things together.

Hopi clans have traveled all over the Black Mesa area leaving our sacred shrines, ruins, burial grounds and prayer feathers behind. Today, our sacred ceremonies, during which we pray for such things as rain, good crops, and a long and good life, depend on spiritual contact with these forces left behind on Black Mesa. Our prayers, songs, ceremonies and rituals draw their strength and vitality from the spiritual forces left by our ancestors. Each year, after our ceremonies in the Kiva of each village, Hopi messengers carry our sacred prayer feathers and cornmeal and plant them at these spiritual places and shrines. This is our contact with the spirit, people who are our ancestors who lived and traveled in these areas. The purpose is to bring rain so that our crops will grow. If these places are disturbed or destroyed, our prayers and ceremonies will lose their force and a great calamity will befall not only the Hopi, but all of mankind.

Hopis are the caretakers for all the world, for all mankind. Hopi lands extend all over the continents, from sea to sea. But the lands at the sacred center are the key to life. By caring for these lands in the Hopi way, in accordance with instructions from the Great Spirit, we keep the rest of the world in balance.

To us, it is unthinkable to give up control over our sacred lands to non-Hopis. We have no way to express exchange of sacred lands for money. It is alien to our ways. The Hopis never gave authority and never will give authority to anyone to dispose of our lands and heritage and religion for any price. We received these lands from the Great Spirit and we must hold them for him, as a steward, a caretaker, until he returns.

Eagle shrines are located throughout the Black Mesa area. The prayer feathers that are so essential to our religious life and all our ceremonies must be Eagle-feathers. Without them, we cannot place and carry our sacred messages to the spiritual world, we cannot hold the land for the Great Spirit. If the eagles are forced to flee the heart of our Mother Earth because of man's activity, it will no longer be possible for us to live in our spiritual and religious way. The life of all people as well as animal and plant life depend on the Hopi spiritual prayers and song. The world will end in doom.

Water under the ground has much to do with rain clouds. Everything depends upon the proper balance being maintained. The water under the ground acts like a magnet attracting rain from the clouds; and the rain in the clouds also acts as a magnet raising the water table under the ground to the roots of our crops and plants. Drawing huge amounts of water from beneath Black Mesa in connection with the stripmining will destroy the harmony, throw everything we have strived to maintain out of kilter. Should this happen, our lands will shake like the Hopi rattle; land will sink, land will dry up. Rains will be barred by unseen forces because we Hopis have failed to protect the land given us, as we were instructed. Plants will not grow; our corn will not yield and animals will die. When the corn will not grow, we will die; not only Hopis, but all will disintegrate to nothing.

We, the Hopi religious leaders, have watched as the white man has destroyed his lands, his water and his air. The white man has made it harder and harder for us to maintain our traditional ways and religious life. Now—for the first time—we have decided to intervene actively in the white man's courts to prevent the final devastation. We should not have had to go this far. Our words have not been heeded. This might be the last chance. We can no longer watch as our sacred lands are wrest from our

control, as our spiritual center disintegrates. We cannot allow our control over our spiritual homelands to be taken from us. The hour is already very late.

/s/ Starlie Lomayaktewa
STARLIE LOMAYAKTEWA,
KIKMONGWI OF MISHONGNOVI

/s/ Ned Nayatewa
NED NAYATEWA,
KIKMONGWI OF FIRST MESA

/s/ Mina Lansa
MINA LANSA, KIKMONGWI OF
ORAIBI, KYAKOTSMOVI AND
LOWER MOENKOPI

/s/ Claude Kewanyama
CLAUDE KEWANYAMA, KIKMONGWI
OF SHUNGOPARI AND SIPAULOVI

/s/ Jack Pongayesvia
JACK PONGAYESVIA

/s/ David Monongye
DAVID MONONGYE,
RELIGIOUS LEADERS OF
HOTEVILLA

/s/ Thomas Banyacya, Sr.
THOMAS BANYACYA, SR.,
OFFICIAL INTERPRETER,
VILLAGE OF KYAKOTSMOVI

/s/ Carlotta Shattuck
CARLOTTA SHATTUCK,
RECORDER, VILLAGE OF WALPI

BAD BLEED

Exhibit B

CONSTITUTION AND BY-LAWS OF THE HOPI INDIANS *

PREAMBLE

This Constitution, to be known as the Constitution and By-Laws of the Hopi Tribe, is adopted by the self-governing Hopi and Tewa villages of Arizona to provide a way of working together for peace and agreement between the villages, and of preserving the good things of Hopi life, and to provide a way of organizing to deal with modern problems, with the United States Government and with the outside world generally.

ARTICLE I—JURISDICTION

The authority of the Tribe under this Constitution shall cover the Hopi villages and such land as shall be determined by the Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe, and such lands as may be added thereto in future. The Hopi Tribal Council is hereby authorized to negotiate with the proper officials to reach such agreement, and to accept it by a majority vote.

ARTICLE II—MEMBERSHIP

SECTION 1. Membership in the Hopi Tribe shall be as follows:

(a) All persons whose names appear on the census roll of the Hopi Tribe as of January 1st, 1936, but within one year from the time that this Constitution

---

* The Constitution and By-Laws are reproduced here in their original form. On August 1, 1969, several years after the agency action complained of in this Complaint, amendments to Articles I, IV and V were approved by the Assistant Secretary of the Interior. The amendments, which are not relevant to this controversy, are reproduced separately in this Exhibit following the original Constitution and By-laws.

takes effect corrections may be made in the roll by the Hopi Tribal Council with the approval of the Secretary of the Interior.

(b) All children born after January 1, 1936, whose father and mother are both members of the Hopi Tribe.

(c) All children born after January 1, 1936, whose mother is a member of the Hopi Tribe, and whose father is a member of some other tribe.

(d) All persons adopted into the Tribe as provided in Section 2.

SEC. 2. Non-members of one-fourth degree of Indian blood or more, who are married to members of the Hopi Tribe, and adult persons of one-fourth degree of Indian blood or more whose fathers are members of the Hopi Tribe, may be adopted in the following manner: Such person may apply to the Kikmongwi of the village to which he is to belong, for acceptance. According to the way of doing established in that village, the Kikmongwi may accept him, and shall tell the Tribal Council. The Council may then by a majority vote have that person's name put on the roll of the Tribe, but before he is enrolled he must officially give up membership in any other tribe.

SEC. 3. Resident members shall be those who already live in the Hopi jurisdiction and who have been living therein for not less than six months. Only resident members of twenty-one years of age or over shall be qualified to vote in any election or referendum. Any adult member who is away from the jurisdiction for six months continuously, shall cease to be a resident member until he has again lived in the jurisdiction for the necessary time.

ARTICLE III—ORGANIZATION

SECTION 1. The Hopi Tribe is a union of self-governing villages sharing common interests and working for the common welfare of all. It consists of the following recognized villages:

First Mesa (consolidated villages of Walpi, Shitchumovi, and Tewa).
Mishongnovi.
Sipaulavi.
Shungopavi.
Oraibi.
Kyakotsmovi.
Bakabi.
Hotevilla.
Moenkopi.

SEC. 2. The following powers which the Tribe now has under existing law or which have been given by the Act of June 18, 1934, (48 Stat. 984) and acts amendatory thereof or supplemental thereto, are reserved to the individual villages:

(a) To appoint guardians for orphan children and incompetent members.

(b) To adjust family dispute and regulate family relations of members of the villages.

(c) To regulate the inheritance of property of the members of the villages.

(d) To assign farming land, subject to the provisions of Article VII.

SEC. 3. Each village shall decide for itself how it shall be organized. Until a village shall decide to organize in another manner, it shall be considered as being under the traditional Hopi organization, and the Kikmongwi of such village shall be recognized as its leader.

SEC. 4. Any village which does not possess the traditional Hopi self-government, or which wishes to make a change in that government or add something to it, may adopt a village Constitution in the following manner: A Constitution, consistent with this Constitution and By-laws, shall be drawn up, and made known to all the voting members of such village, and a copy shall be given to the Superintendent of the Hopi jurisdiction. Upon the request of the Kikmongwi of such village, or of 25% of the voting members thereof, for an election on such Constitution, the Superintendent shall make sure that all members have had ample opportunity to study the proposed Constitution. He shall then call a special meeting of the voting members of such village, for the purpose of voting on the adoption of the proposed Constitution, and shall see that there is a fair vote. If at such referendum, not less than half of the voting members of the village cast their votes, and if a majority of those voting accepts the proposed Constitution, it shall then become the Constitution of that village, and only officials chosen according to its provisions shall be recognized.

The village Constitution shall clearly say how the Council representatives and other village officials shall be chosen, as well as the official who shall perform the duties placed upon the Kikmongwi in this Constitution. Such village Constitution may be amended or abolished in the same manner as provided for its adoption.

ARTICLE IV—THE TRIBAL COUNCIL

SECTION 1. The Hopi Tribal Council shall consist of representatives from the various villages. The number of representatives from each village shall be determined according to its population, as follows: villages of 50 to 250 population, one representative; villages of 251 to 500 population, two representatives; villages of 501 to 750 population, three representatives; villages of over 750 population, four representatives.

BAD BLEED

The representation in the first Tribal Council shall be as follows:

First Mesa	4
Mishongnovi	2
Sipaulavi	1
Shungopavi	2
Oraibi	1
Kyakotsmovi	2
Bakabi	1
Hotevilla	2
Moenkopi	2

SEC. 2. Representatives shall serve for a term of one year and may serve any number of terms in succession.

SEC. 3. Each representative must be a member of the village which he represents. He must be twenty-five years or more of age, and must have lived in the Hopi jurisdiction for not less than two years before taking office, and must be able to speak the Hopi language fluently.

SEC. 4. Each village shall decide for itself how it shall choose its representatives, subject to the provisions of section 5. Representatives shall be recognized by the Council only if they are certified by the Kikmongwi of their respective villages. Certifications may be made in writing or in person.

SEC. 5. One representative of the village of Moenkopi shall be selected from the Lower District, and certified by the Kikmongwi of Moenkopi, and one representative shall be selected by the Upper District, and certified by the official whom that District may appoint, or who may be specified in a village Constitution adopted under the provisions of Article III, section 4. This section may be repealed, with the consent of the Tribal Council, by vote of a two-thirds majority at a meeting of the voting members of Moenkopi village called and held subject to the provisions of Article III, section 4.

SEC. 6. No business shall be done unless at least a majority of the members are present.

SEC. 7. The Tribal Council shall choose from its own members a Chairman and Vice-Chairman, and from the Council or from other members of the Tribe, a Secretary, Treasurer, Sergeant-at-Arms, and interpreters, and such other officers and committees as it may think necessary, subject to the provisions of the By-laws, Article I.

ARTICLE V—VACANCIES AND REMOVAL FROM OFFICE

SECTION 1. Any representative or other officer found guilty in a tribal or other court of misdemeanor involving dishonesty, of a felony, or of drunkenness, shall be automatically removed from office, and the Council shall refuse to recognize him.

SEC. 2. Any officer or representative may be removed from office for serious neglect of duty, by a vote of not less than two-thirds of the Council, after the officer to be so removed has been given full opportunity to hear the charges against him and to defend himself before the Council.

SEC. 3. Vacancies occurring for any reason among the representatives shall be filled for the rest of the term by the village concerned, in the same manner as a representative from that village is ordinarily chosen.

Vacancies occurring for any reason among the officers appointed by the Council shall be filed by the Council.

ARTICLE VI—POWERS OF THE TRIBAL COUNCIL

SECTION 1. The Hopi Tribal Council shall have the following powers which the Tribe now has under existing law or which have been given to the Tribe by the Act of

June 18, 1934. The Tribal Council shall exercise these powers subject to the terms of this Constitution and to the Constitution and Statutes of the United States.

(a) To represent and speak for the Hopi Tribe in all matters for the welfare of the Tribe, and to negotiate with the Federal, State, and local governments, and with the councils of governments of other tribes.

(b) To employ lawyers, the choice of lawyers and fixing of fees to be subject to the approval of the Secretary of the Interior.

(c) To prevent the sale, disposition, lease or encumbrance of tribal lands, or other tribal property.

(d) To advise with the Secretary of the Interior and other governmental agencies upon all appropriation estimates or Federal projects for the benefit of the Tribe before the submission of such estimates to the Bureau of the Budget or to Congress.

(e) To raise and take care of a tribal council fund by accepting grants or gifts from any person, State, or the United States Government, or by charging persons doing business within the Reservation reasonable license fees, subject to the approval of the Secretary of the Interior.

(f) To use such tribal council fund for the welfare of the Tribe, and for salaries or authorized expenses of tribal officers. All payments from the tribal council fund shall be a matter of public record at all times.

(g) To make ordinances, subject to the approval of the Secretary of the Interior, to protect the peace and welfare of the Tribe, and to set up courts for the settlement of claims and disputes, and for the trial and punishment of Indians within the jurisdiction charged with offenses against such ordinances.

(h) To act as a court to hear and settle claims or disputes between villages in the manner provided in Article VIII.

(i) To provide by ordinance, subject to the approval of the Secretary of the Interior, for removal or exclusion from the jurisdiction of any non-members whose presence may be harmful to the members of the Tribe.

(j) To regulate the activities of voluntary cooperative associations of members of the Tribe for business purposes.

(k) To protect the arts, crafts, traditions, and ceremonies of the Hopi Indians.

(l) To delegate any of the powers of the council to committees or officers, keeping the right to review any action taken.

(m) To request a charter of incorporation to be issued as provided in the Act of June 18, 1934.

(n) To adopt resolutions providing the way in which the Tribal Council itself shall do its business.

SEC. 2. Any resolution or ordinance which, by the terms of this Constitution, is subject to review by the Secretary of the Interior, shall be given to the Superintendent of the jurisdiction, who shall, within ten days thereafter, approve or disapprove the same.

If the Superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the Superintendent shall send a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within ninety days from the date of enactment, veto said ordinance or resolution for any reason by notifying the Tribal Council of his decision.

If the Superintendent shall refuse to approve any ordinance or resolution submitted to him, within ten days after enactment, he shall report his reasons to the Tribal Council. If the Tribal Council thinks these reasons are not sufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

SEC. 3. The Hopi Tribal Council may exercise such further powers as may in the future be delegated to it by the members of the Tribe or by the Secretary of the Interior, or any other duly authorized official or agency of the State or Federal Government.

SEC. 4. Any rights and powers which the Hopi Tribe of Indians now has, but which are not expressly mentioned in this Constitution, shall not be lost or limited by this article, but may be exercised by the members of the Hopi Tribe of Indians through the adoption of appropriate by-laws and constitutional amendments.

ARTICLE VII—LAND

SECTION 1. Assignment or use of farming land within the traditional clan holdings of the villages of First Mesa, Mishongnovi, Sipaulavi, and Shungopavi, and within the established village holdings of the village of Kyakotsmovi, Bababi, Oraibi, Hotevilla, and Moenkopi, as in effect at the time of approval of this Constitution, shall be made by each village according to its established custom, or such rules as it may lay down under a village Constitution adopted according to the provisions of Article III, section 4. Unoccupied land beyond the clan and village holdings mentioned shall be open to the use of any member of the Tribe, under the supervision of the Tribal Council. Nothing in this article shall permit depriving a member of the Tribe of farming land actually occupied and beneficially

used by him at the time of approval of this Constitution, but where an individual is occupying or using land which belongs to another by agreement with the owner, that land shall continue to belong to that owner.

SEC. 2. In order to improve and preserve the range, range land shall be supervised by the Tribal Council in cooperation with the various United States Government agencies.

SEC. 3. All springs shall be considered the property of the Tribe, and no individual or group of individuals shall be allowed to prevent the reasonable use of any spring by members of the Tribe generally, but the individual who develops a spring, or on whose land it is, shall have the first use of it.

SEC. 4. The administration of this article shall be subject to the provisions of section 6 of the Act of June 18, 1934.

ARTICLE VIII—DISPUTES BETWEEN VILLAGES

SECTION 1. When a dispute arises between villages over any matter, the Kikmongwi of any village party to the dispute may inform the Chairman of the Tribal Council of the nature of the dispute, and ask him to call a special meeting of the Council to settle the matter.

The Chairman shall thereupon call a special meeting of the Council, to be held on the eighth day from the day of such request, at which meeting he, and the Council representatives or other persons chosen by each village party to the dispute to speak for it before the Council, may summon all witnesses having evidence to give in the matter, and may examine them.

When the Council has heard all the evidence and examined the witnesses to its satisfaction, it shall hold a secret meeting which shall not be attended by the representatives of the villages party to the dispute, and after full and

careful consideration and discussion, shall vote on a decision. Such decision shall become effective when it is carried by a majority of the Council members present. The Council shall keep a record of the evidence and the reasons for its decision.

SEC. 2. If both the Chairman and the Vice-Chairman are representatives of villages party to the dispute, the Council shall elect a temporary Chairman to serve for the duration of the trial.

SEC. 3. If any village party to the dispute feels that the decision of the Council in such case is unjust, the Kikmongwi of that village may notify the Superintendent within ten days, and the decision of the Council shall then be subject to review by the Secretary of the Interior, within ninety days thereafter, in the manner provided in Article XI, section 2.

ARTICLE IX—BILL OF RIGHTS

SECTION 1. All resident members of the Tribe shall be given equal opportunities to share in the economic resources and activities of the jurisdiction.

SEC. 2. All members of the Tribe shall be free to worship in their own way, to speak and write their opinion, and to meet together.

ARTICLE X—AMENDMENT

Any representative may propose an amendment to this Constitution and By-laws at any meeting of the Council. Such proposed amendment may be discussed at that meeting, but no vote shall be taken on it until the next following meeting of the Council. If the Council shall then approve such proposed amendment by a majority vote, it shall request the Secretary of the Interior to call a referendum for accepting or rejecting such amendment. It shall then be the duty of the Secretary of the Interior to call

such referendum, at which the proposed amendment may be adopted subject to the Secretary's approval, in the same manner as provided for the adoption and approval of this Constitution and By-laws.

BY-LAWS OF THE HOPI TRIBE

ARTICLE 1—DUTIES AND QUALIFICATIONS OF OFFICERS

SECTION 1. The Chairman shall preside over all meetings of the Tribal Council. He shall perform all duties of a Chairman fairly and impartially, and exercise any authority delegated to him by the Council. He shall vote only in case of a tie.

SEC. 2. The Vice-Chairman shall help the Chairman in his duties when called upon to do so, and in the absence of the Chairman shall act as Chairman with all the attendant powers and duties.

SEC. 3. The representatives shall perform the duties of the Council, set forth in this Constitution and By-laws. They shall inform the people of their villages of the matters discussed and the actions taken, and they shall fairly and truly represent the people of their villages.

SEC. 4. The Secretary shall write all tribal correspondence, as authorized by the Council, and shall keep an accurate record of all action of regular and special meetings of the Council. He shall keep a copy of such records in good order and available to the general public and shall send another copy of them, following each meeting of the Council, to the Superintendent of the jurisdiction. He shall have a vote in the Council only if he is a regular representative.

The Secretary must be a resident member of the Hopi Tribe, and must be able to speak the Hopi language fluently, and to read and write English well.

SEC. 5. The Treasurer shall receive, receipt for, and take care of all funds in the custody of the Council, and deposit them in a bank or elsewhere as directed by the Council. He shall make payments therefrom only when authorized by a resolution of the Council, and in the manner authorized. He shall keep a faithful record of such funds, and shall report fully on receipts, payments, and amounts in hand at all regular meetings of the Council and whenever requested to do so by the Council. His accounts shall be open to public inspection.

He shall have a vote in the Council only if he is a regular representative.

The Treasurer may be required by the Council to give a bond satisfactory to the Council and to the Commissioner of Indian Affairs.

The Treasurer must be a resident member of the Hopi Tribe, and must be able to speak the Hopi language fluently and to read and write English well.

SEC. 6. The interpreter or interpreters shall be resident members of the Hopi Tribe, and shall be able to interpret fluently and accurately in the Hopi, English and Navajo languages, and shall do so whenever requested by the Council. Interpreters shall have a vote in the Council only when they are regular representatives.

SEC. 7. The Sergeant-at-Arms, at the orders of the Chairman, shall enforce order in the Council, and shall summon all persons required to appear before the Council, and deliver notices of special meetings, and perform such other duties as may be required of him by the Council.

The Sergeant-at-Arms shall be a resident member of the Hopi Tribe, and must be able to speak Hopi fluently, and to speak English.

SEC. 9. The qualifications and duties of all committees and officers appointed by the Council shall be clearly de-

fined by resolution of the Tribal Council at the time the positions are created. Such committees or officers shall report to the Council whenever required.

ARTICLE II—MEETINGS OF THE COUNCIL

SECTION 1. Regular meetings of the Tribal Council shall be held on the first day of December, March, June, and September, at such places as shall be determined by the Council.

SEC. 2. Within sixteen days after this Constitution goes into effect, the villages shall choose their representatives for the first term of one year, and on the sixteenth day the first meeting of the Council shall be held at Oraibi Day School.

SEC. 3. Special meetings of the Council shall be called by the Chairman in his discretion or at the request of four representatives, or in the case of a dispute between villages, as provided in Article VIII of the Constitution. Notice of special meeting shall be delivered to each representative not less than eight days before such meeting, together with a statement of the business to be discussed thereat.

SEC. 4. All members of the Hopi Tribe may attend any meeting of the Council, but they may not speak, except by invitation of the Council. Non-members may be invited by the Council to attend any meeting and to address it.

SEC. 5. The Council may employ, or may request the Superintendent of the jurisdiction to furnish, a clerk trained in shorthand, to take down verbatim minutes of any meeting.

SEC. 6. When the Council desires advise of, or consultation with, any officer of the Federal Government, it may invite him to attend any meeting and may give him the privilege of the floor.

ARTICLE III—ORDINANCES AND RESOLUTIONS

All ordinances and resolutions shall be recorded and available at all times for the information and education of the Tribe. Copies of all ordinances shall be posted from time to time in a public place in each village.

ARTICLE IV—EAGLE HUNTING TERRITORIES AND SHRINES

The Tribal Council shall negotiate with the United States Government agencies concerned, and with other tribes and other persons concerned, in order to secure protection of the right of the Hopi Tribe to hunt for eagles in its traditional territories, and to secure adequate protection for its outlying, established shrines.

ARTICLE V—ALL-PUEBLO COUNCIL

The Tribal Council may appoint delegates to speak for the Tribe at the All-Pueblo Council, and to report to the Council and the Tribe on all proceedings thereof.

ARTICE VI—ADOPTION OF CONSTITUTION AND BY-LAWS

This Constitution and By-laws, when ratified by a majority vote of the adult members of the Hopi Tribe voting at a referendum called for the purpose by the Secretary of the Interior, provided that at least thirty percent of those entitled to vote shall vote at such referendum, shall be submitted to the Secretary of the Interior, and if approved, shall take effect from the date of approval.

CERTIFICATION OF ADOPTION

Pursuant to an order, approved September 30, 1936, by the Secretary of the Interior, the attached Constitution and By-laws was submitted for ratification to the Hopi Tribe residing on the Hopi Reservation, and was on

October 24, 1936, duly adopted by a vote of 651 for, and 104 against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934, (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

GEORGE COOCHISE,
Chairman of Election Board.

ALBERT YAVA,
Secretary of Election Board

A. G. HUTTON, *Suprintendent.*

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the act of June 18, 1964 (48 Stat. 984), as amended, do hereby approve the attached Constitution and By-laws of the Hopi Tribe.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Afairs, so far as they may be incompatible with any of the provisions of the said Constitution and By-laws are hereby declared inapplicable to these Indians.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and By-laws.

Approval recommended December 14, 1936.

JOHN COLLIER,
Commissioner of Indian Affairs.

HAROLD L. ICKES,
Secretary of the Interior
[SEAL]

Washington, D.C., December 19, 1936

AMENDMENT
CONSTITUTION AND BYLAWS
OF THE
HOPI TRIBE
ARIZONA

AMENDMENT I

Section 3 of Article II, Membership, shall be deleted in its entirety.

The first sentence of Article IV, The Tribal Council, shall be amended to read:

> *Section 1.* The Hopi Tribal Council shall consist of a chairman, vice chairman and representatives from the various villages.

Section 2 of Article IV, The Tribal Council, shall be amended in its entirety to read as follows:

> *Sec. 2.* The term of office of the representatives shall be two years, except that at the first election or choosing of representatives following the adoption of this section, approximately one-half of the representatives shall serve for a term of one year. The determination as to which representative shall serve for one year shall be made by the tribal council and announced to each village Kickmongvi or Governor on or before the first day of October 1969. Representatives may serve any number of terms in succession or otherwise.

Section 7 of Article IV, the Tribal Council, shall be amended to read as follows:

> *Sec. 7.* The chairman and vice-chairman shall be elected by secret ballot by all members of the Hopi Tribe. The tribal council shall choose from its own members or from other members of the tribe, a secretary, treasurer, sergeant-at-arms and interpreters and such other officers and committees as it may determine

necessary, subject to the provisions of the Bylaws, Article 1.

Article IV, The Tribal Council, shall be amended by adding to it Sections 8, 9, 10, 11, 12 and 13 as follows:

Sec. 8. All members of the Hopi Tribe twenty-one years of age or over shall be qualified to vote in any election or referendum, other than village elections and referendums under such rules and regulations as may be prescribed by the Hopi Tribal Council and approved by the Secretary of the Interior.

Sec. 9. The chairman and vice-chairman shall each serve for a term of four years. Candidates for the offices of chairman and vice-chairman shall be members of the Hopi Tribe, twenty-five yars of age or older and must be able to speak the Hopi language fluently. Each candidate for either of said offices must also have lived on the Hopi Reservation for not less than two years immediately preceding his announcement of such candidacy.

Sec. 10. Candidates for the offices of chairman and vice-chairman may declare their candidacy by filing with the tribal secretary or tribal chairman or vice-chairman a petition signed by at least ten adult members of the tribe at least 15 days before the date set for the election. It shall be the duty of the secretary to post the names of the qualified candidates for both the primary and final elections in a public place in each village at least ten days prior to the election.

Sec. 11. A primary election shall be held on the first Wednesday in November in 1969 and on the first Wednesday in November in every fourth year thereafter, provided that, no primary election shall be held in the years when there shall be no more than two candidates for either of the offices of chairman and vice-chairman.

The two candidates in a primary election receiving the highest number of votes for each of said offices of chairman and vice-chairman shall have their names entered in the final election. In the event there are not more than two candidates for either of such offices these candidates with no more than one competing candidate shall have their names entered in the final election without the necessity of a primary election.

Sec. 12. The general election shall be held on the third Wednesday in November 1969 and on the third Wednesday in November in every fourth year thereafter.

Sec. 13. Inauguration the chairman and vice-chairman shall take place at the first regular tribal council meeting following their election.

AMENDMENT
CONSTITUTION AND BYLAWS
OF THE
HOPI TRIBE
ARIZONA

AMENDMENT II

Article V, Vacancies and Removal from Office, shall be amended as follows:

Section 1. Any chairman, vice-chairman, representative or other officer found guilty in a tribal or other court of a misdemeanor involving dishonesty, of a felony, or of drunkenness, shall be automatically removed from office, and the council shall refuse to recognize him.

Section 3, paragraph 3 shall be added as follows:

Vacancies occurring for any reason in the offices of chairman and vice-chairman or in the office of any other officer shall be filled for the rest of the term in the same manner as those officers are ordinarily chosen.

APPROVAL

I, Harrison Loesch, Assistant Secretary of the Interior of the United States of America, by virtue of the authority granted to me by the Act of June 18, 1934 (68 Stat. 984), as amended, do hereby approve the attached Amendments I and II to the Constitution and Bylaws of the Hopi Tribe of Arizona.

Approval Recommended:

Signed Acting Deputy, J. L. Norwood
Commissioner of Indian Affairs

Signed Harrison Loesch
Assistant Secretary of the Interior

Washington, D.C.
Date: August 1, 1969

Exhibit C

United States
Department of the Interior
Office of the Solicitor
Washington

Dec. 14, 1937

Memorandum to the
Commissioner of Indian Affairs:

The Hopi Tribal Council on October 5 passed a resolution accepting and adopting sections 1 and 2 of Chapter 3 on Domestic Relations, of the Law and Order Regulations approved by the Secretary of the Interior on November 27, 1935. This resolution was approved by the Superintendent on October 6. The Indian Office has prepared for the approval of the Assistant Secretary a letter to the chairman of the Hopi Tribal Council stating that this ordinance was

adopted pursuant to Article VI, section 1(g) of the Hopi Constitution, became effective on approval of the Superintendent, and that no reason is found requiring its rescission by the Secretary.

In the consideration of this resolution in the Indian Office the provisions of Article III of the Hopi Constitution seem to have been overlooked. In section 2(b) of this article the regulation of family relations is reserved to the self-governing villages which compose the Hopi Tribe. The reservation to the villages of the control of local matters is a cardinal feature of the Hopi Constitution. Mr. Oliver LaFarge who drafted this constitution with the Indians, in reporting at various times to the Commissioner of Indian Affairs, explained that Article III was intended to protect the entity of the individual villages and to reserve to them the powers which they then had. The Hopi tribal organization was to be a union of self-governing villages to provide a mechanism for handling certain inter-village affairs. Accordingly, the enumerated powers of the Tribal Council were to be as close to the legal minimum as possible. However, the intent of the framers of the constitution need not be relied upon as Article III is a clear reservation of the control of family relations to the villages, even though Article VI, Section 1(g), would permit the Tribal Council to make general ordinances to protect tribal peace and welfare.

Accordingly, I believe this resolution of the Hopi Tribal Council must be rescinded as not in conformity with the constitution. The resolution would accept as applicable to the Hopi Tribe the provision in the Law and Order Regulations that the Tribal Council shall have authority to determine whether Indian custom marriage and divorce shall be recognized in the future as lawful and what shall constitute such marriage and divorce. Such determination and definition would be a principal function of the regulation of family relations. It is suggested that the Tribal

Council be advised of this constitutional impediment to their action in this field, but that they be invited to inform this office of any special problems on the reservation which they intended to cope with in this resolution, so that we may be able to advise them further in this connection. It appears that no information was submitted with this resolution which would explain its adoption.

It is also suggested that in the letter to the Tribal Council to be signed by the Assistant Secretary rescinding this ordinance it be stated that the definition of the term Tribal Council in section 19 of Chapter I of the Law and Order Regulations for the Navajo and Hopi jurisdictions (which, incidentally, supplant the general law and order regulations referred to in the Tribal Council's resolution) shall be construed to include the governing body of the village wherever in the Hopi Constitution the village rather than the entire tribe possesses tribal powers involved in the Law and Order Regulations. A formal amendment of these regulations is not considered necessary as they may properly be construed in the light of the provisions of the constitution, and to the extent that the villages both before and after the adoption of the constitution had and have self-governing powers they may be considered "tribes" within the meaning of the term in section 19, Chapter 1, of the regulations.

/s/ NATHAN R. MARGOLD
Solicitor.

United States
Department of the Interior
Office of Indian Affairs
Field Service

Hopi Indian Agency
Keams Caiion, Arizona
August 28, 1936

MEMORANDUM FOR THE COMMISSIONER OF INDIAN AFFAIRS

THE PROPOSED HOPI CONSTITUTION

In considering this Constitution it must be borne in mind that its text has been formed by arriving at agreement between nine independent villages, one of which (First Mesa) is a consolidation of three full-sized villages, having no tradition of tribal action and very little of union of any sort. In these villages are found two unrelated languages, Hopi and Tewa, and various dialects, important social differences, unlike interests, and extreme divergence in the acceptance of white (European) culture.

This means that it has been necessary to protect unlike interests and meet unlike needs, and that any attempt to alter these agreements will be looked upon with great suspicion.

As an example, the immediately neighbourings villages of Kyaköchumovi and Oraibi may be taken. The former has little or no use for the traditional Hopi organization and is about half Christian. It is ready forthwith to adopt a modern village constitution (*Article III, Section 4*) with a local council, chairman, etc. Oraibi, on the other hand, would not consider a Constitution which did not contain the provisions of *Article III, Section 3*, recognizing the traditional organization and allowing it to continue without change.

About 80% of these Indians follow the Hopi religious and civil establishment today, and desire to continue so

doing. They will accept nothing which goes contrary to it. Hence it is necessary so to write the document that the old Hopi organization is recognized and protected, and at the same time, so that when the various villages reach the point at which their majorities will wish to take up more modern methods, they will be free to do so. This balance, or open choice, occurs in various places in the Constitution, as in *Article III, Article VII, Article II, Section 2.*

In the experience of these Indians, the white man is hostile to the Hopi culture and all that goes with it. Ultimate adoption or rejection of the proposed Constitution will depend upon whether it is clearly not inconsistent with that culture. When it is returned from Washington, it will be very carefully examined for changes. The white man, they say, "talks very cleverly to the Hopis. Then he goes back to Washington and does just the other way. Every time the Hopis lose something and the promise is broken."

For this reason also, every day which elapses while the Constitution is under consideration in Washington, will be a day of added suspicion and mistrust. If the Hopis are to remain in their present attitude of taking up that new and unusual thing, coöperation, if they are to accept this Constitution, then it must return to them by the first week in October, and the referendum must be called by the end of that month. The Hopis themselves have insisted upon this to me.

Leaders and committees in all the villages have considered this Constitution most carefully. Again and again it has been corrected to suit their needs and wishes. Progressives and Conservatives alike are agreed upon the document thus formed. It provides at once, protection for those who wish to continue in the old Hopi way, and the means of change for those who want it. All corrections will be looked over with care. Any language which they

do not understand, or which has not been explained to them, will be taken for a possible trap. Any major change will cause rejection at the polls.

THE KIKMONGWI

This Constitution does not explain how the Kikmongwi is selected, or who he is. To do so would require an ethnological treatise. The Kikmongwi is the true leader in the conservative villages—seven out of nine. There is none at Kyaköchumovi. At Mishongnovi there are six, holding office in rotation for four years apiece. At First Mesa there are two, one at Tewa and one at Walpi, but by an old internal agreement, the Walpi Kikmongwi is first, and so recognized. Tewas and Hopis alike agree that he is the person referred to in *Article III, Section 5.*

Careful inquiry shows that *at no time is there any doubt in the minds of the Indians* as to just who is Kikmongwi in a given village. The native born has to be used. There are six to a dozen "chiefs" in every village. The word Kikmongwi has an unavoidable meaning, and its use has caused much confidence on the part of the pro-Hopi majority of the tribe.

VILLAGE MEMBERSHIP

Similarly, no manner of determining village membership has been specified. Until the tribe changes materially, the matter is too complex, involving matrilineal and matrilocal controls, clan membership, society membership, and residence. To specify now would be to crystallize a situation which may eventually change. However, here again there is absolutely no doubt whatsoever as to who is a member of what village, and it is most unlikely that any question on the subject will arise.

NOTES ON SPECIFIC PROVISIONS

Article I

At present there exists no exclusive Hopi jurisdiction or reservation. One of our main immediate purposes in organizing this Tribe is to have a responsible representative body, through which settlement can be made of a situation which today is extremely troublesome to Hopis, Navajos, and Indian Service alike. Therefore the usual provision on Jurisdiction has, of necessity, to be written rather as a power to negotiate for and accept such a Jurisdiction. These negotiations are going to be long and difficult; to try to settle the boundary question first would be to postpone organization of the tribe indefinitely.

Article II

The membership requirements are somewhat similar to those of the Santa Clara Constitution, save that they recognize the matrilineal descent which is deeply imbedded in the Hopi system. The Hopis all agree that any child of a Hopi mother is a Hopi, regardless of who the father may be, but finally were willing to restrict this to unions between Hopi women and members of other tribes. Degree of blood could not be specified in this case.

In the matter of adoption, *Section 2*, degree of blood (one quarter) was arrived at by lengthy consideration of specific cases. The manner of adoption allows conservative villages to follow the present established method, while making it possible for progressive villages to change this when they get ready to.

The residence requirement, with its reflection in Article IX, is urgently desired by the Indians. Hopis living entirely away from the reservation, but appearing at irregular intervals to air miscellaneous knowledge and interfere in local affairs, have been a great source of confusion and irritation.

Article III

This Article as a whole is explained by the opening remarks of this memorandum. It protects the entity of the individual villages, reserves to them powers which they now have, protects the Hopi organization so long as that is the majority's choice, and provides for change when that choice changes.

In the list of villages, *Section 1*, the explanatory parenthesis under the name of First Mesa should be retained in the final version of the Constitution. The members of the sub-villages which are voluntarily consolidating consider it most important that these names be preserved in this manner.

Note the spelling of the village names, which differs considerably from that now in use. The local names appear, as usual, to have been written with a shovel, and misrepresentations such as Shipaulavi for *Sinungopavi*, Chimopevy for *Sipapopavi* are a source of irritation to the Indians.

Section 2 (a) gives the villages power to appoint guardians without review by the Secretary of the Interior. This power is one which they do now possess under active, customary law, and has never been interfered with. Minors and incompetents are taken care of by members of their clan. The thing is so well established as to be automatic.

Article IV

Section 5 is written to meet the peculiar situation at Moenkopi. The village is at present utterly split over a religious issue, the Kikmongwi's party being in the minority. The two parties will not even attend the same meeting. In time, with the death of about a score of elderly men, this breach will be healed, but until then it is necessary to divide the representation as shown, in order to prevent

the creation of an unrepresented minority of about 200 out of 450 people. The "Progressive" party will probably succeed in putting through a village constitution, and without some such provision this would leave the Kikmongwi and his followers, a group larger in number than some independent villages, in a very painful position. Representation in the Council until the group dissolves, will protect them in such matters as the appointment of judges and police, and the administration of justice.

Both groups have expressed themselves as satisfied with this arrangement.

Article VI

The greater part of this Article is routine. In order to make it comprehensible, it has been written in the simplest English possible. The method of "enumerated powers" has been used, as the Hopis like its clear, specific nature.

Section 1, (e). The Hopis will not consider any reference to levying taxes or general assessments.

Section 1, (k). Any change in the wording of this paragraph will cause rejection of the Constitution. It will be noted that we have not used the word "encourage" usually found in similar provisions, owing to the specific mention of ceremonies. This paragraph, of course, is subject to the general provision of subjection to the United States Constitution and Statutes at the head of *Section 1*, and must be taken in the light of *Article IX, Section 2.* The Hopis understand this fully. It is looked upon by the Hopis as a guarantee that the Government is no longer hostile to their culture, and that this Constitution is not a trap to destroy it.

They also refused to consider any provision for compulsory community work.

Article VII

Here again it is necessary to meet the needs of unlike situations. Some villages hold their lands by clans, others do not. There is a complicated system of rentals, mainly intra-family, certain holdings have been established by pure use-occupancy, a sort of squatter's right, and there is what amounts to a Hopi Public Domain. The whole land question is approached with grave suspicion. It has been a matter of internal dissension for years. The present wording of *Section 1* is devised to meet a wide range of objections. Some of it may seem cumbersome or unnecessary, but all of it has been absolutely demanded by the Hopis.

The provisions for Tribal Council control of range land and outlying farming land, represent the result of very careful negotiations. They permit of effective coöperation with the Soil Conservation Service, and avoid what would otherwise be demanded, cutting the reservation up into village tracts, each one exclusively controlled by its village.

Article VIII

The greater part of this Article explains itself fairly well.

The provision for appeal to the Secretary of the Interior is needed, and is desired. It is needed to protect the prestige of the Council as well as to prevent injustice. It must be remembered that at the present state of their evolution, no Hopis will accept an adverse decision, no matter how just. If there is no appeal beyond the Council, the place will be full of allegations of favoritism, and refusals to obey the Council's orders. Appeal to the Secretary, and a decision sustaining the Council, will be an extremely valuable factor. At the same time, the knowledge that its decision can be reviewed will have an effect

upon the Council, inclining it to make an effort to seek a decision which will be upheld.

This has been put to me in various ways by the Indians, with a good deal of emphasis, and I agree heartily with them.

Article IX

Section 1. The limitation of a share in economic resources to resident members has been provided in various existing Constitutions. The main economic resource of this reservation is land, which should be held only by use-occupancy. This provision expresses the will of the Hopis generally.

Article X

The single method of proposing an amendment was asked for by the Hopis. "Our villages are small, and we can control our representatives. If we can't, something is wrong with the whole thing. We don't need a petition." The point is well taken.

By-laws

Articles I and II are more or less mechanical. So also is Article III.

Article IV

This gives expression to matters very near to the Hopi heart. It is, of course, an instruction to the Council rather than a power. The mention of these matters is taken, again, as proof that this Constitution is not hostile to the Hopi culture. It would be dangerous to tamper with this Article.

Articles V and VI are self-explanatory.

In conclusion, I wish to point out again that this Constitution is an attempt to unite a traditionally disunited tribe, the last common action of which was the sacking of the Hopi village of Awatobi about 1710. It is also about the most primitive tribe, in the sense of remaining culturally as it was before the white man came, and thinking along aboriginal lines, that has yet attempted to organize. Its Constitution must therefore be unlike that of other tribes.

The Hopis are interested in the Constitution, willing to try this new thing, to make this effort, *now*. They deeply mistrust Washington. Delay in sending it out to them again, or a vote called later than October 30, may see a complete change of heart. They say to me constantly, "Are you really serious? Is this really different from everything else the white man has done? Is it really going to happen?"

The instant I leave here, they will begin suspecting that it's the same old run-around. Let that suspicion grow strong, and other, blind suspicions will come after it. Then they will reject the document when it returns to them. This may seem illogical. It may be illogical. But it is the fact.

Respectfully submitted,

/s/ Oliver La Farge
Oliver La Farge
Field Representative

Copies to:
Mr. Mutton
Mrs. Westwood

United States
Department of the Interior
Office of the Solicitor
Washington 25, D.C.

May 23, 1960

MEMORANDUM

To: Commissioner of Indian Affairs

From: Assistant Solicitor, Indian Legal Activities

Subject: Request for legal opinion regarding the leasing authority of the Hopi Tribal Council

You request an opinion concerning the extent of leasing authority vested in the Hopi Tribal Council and in the separate village governing bodies.

It appears from the Hopi Tribal constitution that the Hopi Tribe intended to restrict the powers delegated to the Tribal Council, and to retain in the Tribe all tribal powers not specifically delegated. Article VI, concerning the Powers of the Tribal Council, provides that it "shall have the following powers which the Tribe now has under existing law or which have been given to the Tribe by the Act of June 18, 1934." Specific authority is then given "To prevent the sale, disposition, lease or encumbrance of tribal lands, or other tribal property" (Section 1 (c)), but no authority is specifically delegated to do any of these acts. Nor is general authority to transact tribal business included in the specifically delegated powers. Section 1 (a) authorizes the Council "To represent and speak for the Hopi Tribe in all matters for the welfare of the Tribe, * * *." If this were construed broadly to cover dealings with tribal property there would be no need for the numerous specific delegations of power; it refers, evidently, to social welfare. For example, Article VII entitled "Land" provides that "Unoccupied land beyond clan and villages holdings shall be opened to the use of any member

of the Tribe, under the supervision of the Tribal Council" (Section 1), and that range lands "shall be supervised by the Tribal Council", but only "in order to improve and preserve them." (Section 2).

This limited view is also substantiated by the provision of Section 3, Article VI, which states that the council "may exercise such further powers as in the future may be delegated to it * * *."

The powers of the Villages are of a different nature. The January 1, 1954 lease to which you refer was made by the Kyakotsmovi Village, not by the Tribal Council. The Tribal Constitution provides that villages which do not "possess the traditional Hopi self-government, or which wish to make a change in that government * * * may adopt a village constitution * * *." The implication is that the villages continue their self-government functions. The resolution of the Tribal Council of September 28, 1954, which "approved, ratified, and confirmed" that lease, was not an exercise of authority. It was a specific expression of opinion that the Village "has the property rights of the land within said Village" which was being leased, and that the Council recognized the right of the villages "to lease the lands described in said lease." Therefore, it should not be assumed that there is an inconsistancy in the governmental approval of this lease. If a Hopi village's traditional power of self-government included the power to lease village land, or the village has adopted a constitution which does not expressly or impliedly prohibit leasing of village land, such a lease would be valid provided it is properly executed and is not contrary to the provisions of Federal law or regulations concerning the leasing of Indian lands.

(sgd) FRANKLIN SALISBURY
Assistant Solicitor
Indian Legal Activities

United States
Department of the Interior
Office of the Secretary
Washington 25, D.C.

May 24, 1961

Dear Mr. Haverland:

Hopi Tribal Resolution No. H-4-61 forwarded with your letter of March 30 to the Commissioner of Indian Affairs requests a delegation of further powers under Article VI, Section 3, of the Constitution and By-Laws of the Hopi Tribe. Since the constitution and by-laws do not authorize the Council to lease tribal lands, the Council has requested the Secretary of the Interior to delegate authority to it to enter into mineral leases and for other related purposes.

Article VI, Section 3, of the Constitution and By-Laws of the Hopi Tribe states:

> "The Hopi Tribal Council may exercise such further powers as may in the future be delegated to it by the members of the Tribe or by the Secretary of the Interior or any other duly authorized official or agency of the State or Federal Government."

Under the authority granted to the Secretary by Article VI, Section 3, the Hopi Tribal Council is delegated and granted the power to take such measures as are permitted to "Tribal Councils" for developing mineral resources on Indian reservations under 25 CFR 171, "Leasing of Tribal Lands for Mining", as may be amended from time to time and for related purposes. Revenues from such leasing may be appropriated by the Hopi Tribal Council for the benefit of the tribe, including the prosecution of the tribe's law suits and claims. This delegation will continue until it is revoked by this Department. The authority hereby delegated does not apply to any lands which are embraced in

the claim of the Navajos in the case entitled *Healing* v. *Jones,* Civil No. 579, U.S.D.C., Ariz.

We suggest that the tribe consider amending its constitution, in the manner provided by Article X, to specifically authorize the Hopi Tribal Council to lease tribal lands. The Bureau of Indian Affairs will, if requested, give whatever assistance it can in amending this constitution.

Sincerely yours,

/s/ ILLEGIBLE
Assistant Secretary of the Interior

Mr. Frederick M. Haverland
Area Director; Bureau of Indian Affairs
3508 N. 7th Street
Phoenix, Arizona

United States
Department of the Interior
Office of the Secretary
Washington 25, D.C. 20240

Nov. 18, 1964

AIRMAIL

Dear Mr. Head:

In a letter, dated May 24, 1961, from the Assistant Secretary of the Interior to the Phoenix Area Office, authority was delegated to the Hopi Tribal Council to enter into mineral leases and for related purposes. That delegation was made pursuant to Article VI, Section 3 of the Constitution and By-Laws of the Hopi Tribe. The letter contained the following provision:

The authority hereby delegated does not apply to any lands which are embraced in the claim of the Navajos in the case entitled *Healing* v. *Jones*, Civil No. 579, U.S.D.C., Arizona.

On September 23, 1962, the final judgment of the court in the case cited above granted to the Hopi Tribe an exclusive right and interest to District No. 6 as presently constituted which was greater than the area conceded by the Navajo Tribe in its answer to the complaint of the Hopi Tribe. The judgment further provided that the Hopi and Navajo Tribes would have joint undivided and equal rights and interests both as to the surface and subsurface in all of the remaining land within the Executive order reservation of December 16, 1882.

The delegation of authority contained in the Assistant Secretary's letter is modified effective September 28, 1962, to eliminate the sentence quoted above. The authority contained in the delegation is enlarged to include all lands in which the Hopi Tribe has held an interest since September 28, 1962. This delegation will continue until it is revoked by this Department.

Sincerely yours,

(sgd) STEWART L. UDALL
Secretary of the Interior

W. Wade Head, Area Director
Bureau of Indian Affairs
P.O. Box 7007
Phoenix, Arizona 85011

cc: Mr. John W. Boyden, Suite 604, El Paso Natural Gas Bldg., 315 East 2d Street, Salt Lake City, Utah 84111

Superintendent, Hopi Agency

United States
Department of the Interior
Office of the Secretary
Washington 25, D.C.

Aug. 12, 1966

Dear Mr. Head:

The Hopi Tribe requested a delegation of further powers under Article VI, Section 3, of the Constitution and By-Laws of the Hopi Tribe. Since the constitution and by-laws do not authorize the Council to lease tribal lands, the Council has requested the Secretary of the Interior to delegate authority to it to enter into a lease with Western Superior Corporation, lessee and B.V.D. Co., Inc., guarantor, covering approximately 20 acres of land at Winslow, Arizona.

Article VI, Section 3, of the Constitution and By-Laws of the Hopi Tribe states:

> "The Hopi Tribal Council may exercise such further powers as may in the future be delegated to it by the members of the Tribe or by the Secretary of the Interior or any other duly authorized official or agency of the State or Federal Government."

Under the authority granted to the Secretary by Article VI, Section 3, the Hopi Tribal Council is delegated and granted the power to take such measures as are permitted to "tribes or tribal corporations acting through their appropriate officials," for granting leases on tribal land under 25 CFR 131.3(4), and confirms the action of the Hopi Tribal Council in Resolution No. H-25-66 dated August 5, 1966.

Sincerely yours,

/s/ HARRY R. ANDERSON
Assistant Secretary of the Interior

MR. W. WADE HEAD
AREA DIRECTOR
Bureau of Indian Affairs
P.O. Box 7007
Phoenix, Arizona 85011

ROBERT S. PELCYGER
JOHN E. ECHOHAWK
DAVID H. GETCHES
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone (303) 447-8760

MARK I. HARRISON
HARRISON, MYERS & SINGER
1200 Arizona Title Building
111 West Monroe Street
Phoenix, Arizona 85003
Telephone (602) 252-7181

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 72-106 PCT-WEC

STARLIE LOMAYAKTEWA, et al., *Plaintiffs*,

v.

ROGERS C. B. MORTON, et al., *Defendants*,

and

ARIZONA PUBLIC SERVICE COMPANY, et al., *Intervenors*.

(Filed December 20, 1972)

MOTION TO JOIN UNITED STATES AND HOPI TRIBAL COUNCIL AS PARTIES DEFENDANT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Pursuant to Rules 19(a), 20(a) and 21 of the Federal Rules of Civil Procedure, plaintiffs move the court for an order joining the United States and the Hopi Tribal Council as parties defendant in this case and directing the

issuance of service of process upon them, and for grounds therefor show:

1. This is an action to set aside the approval by the defendant Secretary of the Interior of a strip mining lease between the Hopi Tribal Council and the defendant Peabody Coal Company's predecessor in interest.

2. The Hopi Tribal Council and the United States claim interests relating to the above-described subject of the action and are so situated that the disposition of the action in their absence may (i) as a practical matter impair or impede their ability to protect that interest and (ii) leave existing parties subject to a substantial risk of incurring inconsistent obligations by reason of their claimed interest.

3. Plaintiffs seek the joinder of the Hopi Tribal Council for the additional reason that this litigation will raise questions of fact and law that are of great importance to the Hopi Tribal Council and its future activities and operations.

4. Neither the United States nor the Hopi Tribal Council are indispensable parties to this action in whose absence this case should not proceed.

5. The Hopi Tribal Council and the United States are subject to the jurisdiction of this court as to both service of process and venue, and their participation in this action will not deprive this court of jurisdiction.

MARK I. HARRISON
HARRISON, MYERS & SINGER

ROBERT S. PELCYGER
JOHN E. ECHOHAWK
DAVID H. GETCHES
Native American Rights Fund

/s/ by ROBERT S. PELCYGER
Counsel for Plaintiffs

Dated: December 18, 1972

ROBERT S. PELCYGER
JOHN E. ECHOHAWK
DAVID H. GETCHES
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
Telephone (303) 447-8760

MARK I. HARRISON
HARRISON, MYERS & SINGER
1200 Arizona Title Building
111 West Monroe Street
Phoenix, Arizona 85003
Telephone (602) 252-7181

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 72-106 PCT-WEC

STARLIE LOMAYAKTEWA, et al., *Plaintiffs*,

v.

ROGERS C. B. MORTON, et al., *Defendants*,

and

ARIZONA PUBLIC SERVICE COMPANY, et al., *Intervenors*.

(Filed December 20, 1972)

MOTION TO JOIN NAVAJO TRIBE AS A PARTY OR, IN THE ALTERNATIVE, TO GIVE NOTICE OF THE PENDENCY OF THIS ACTION TO THE NAVAJO TRIBE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Pursuant to Rules 19(a), 20(a) and 21 of the Federal Rules of Civil Procedure, plaintiffs move the court for an order joining the Navajo Tribe as a party in this case and directing the issuance of service of process upon it in the

event the court finds that the Navajo Tribe meets the requirements for joinder of Rule 19(a). In the alternative, plaintiffs request that the court provide formal or informal notice of the pendency of this proceeding to the Navajo Tribe, inviting the Tribe to state its position with respect to this litigation. The motion is based upon the following grounds:

1. This is an action to set aside the approval by the defendant Secretary of the Interior of a strip mining lease between the Hopi Tribal Council and the defendant Peabody Coal Company's predecessor in interest. The Navajo Tribe claims to be a joint owner of the land covered by the strip mining lease and has executed a separate strip mining lease with defendant Peabody's predecessor in interest which covers the same area.

2. Plaintiffs do not know whether the Navajo Tribe claims an interest relating to the subject matter of this action within the meaning of Rule 19(a). The defendants and intervenors allege that the Navajo Tribe claims such an interest. If the court is persuaded that the Navajo Tribe meets the requirements of Rule 19(a) as a "person to be joined if feasible," plaintiffs would move for the joinder of the Navajo Tribe as a party. In the alternative, the court could provide formal or informal notice of the pendency of this proceeding to the Navajo Tribe, inviting the Tribe to state its position with respect to this litigation. Such a procedure is specifically mentioned in the Advisory Committee's Notes on Rule 19, 28 U.S.C. Rule 19 (1972 Supplement, p. 36).

3. The Navajo Tribe is not an indispensable party to this action in whose absence this case should not proceed.

4. The Navajo Tribe is subject to the jurisdiction of this court as to both service of process and venue, and its

participation in this action will not deprive this court of jurisdiction.

MARK I. HARRISON
HARRISON, MYERS & SINGER

ROBERT S. PELCYGER
JOHN E. ECHOHAWK
DAVID H. GETCHES
NATIVE AMERICAN RIGHTS FUND

/s/ by ROBERT S. PELCYGER

Counsel for Plaintiffs

Dated: December 18, 1972

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-844

EMERSON SUSENKEWA, ET AL., *Petitioners,*

V.

THOMAS S. KLEPPE, Secretary of the Interior, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jon L. Kyl
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003

John J. Bouma
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073

Donald E. Dickerman
Holesapple, Conner, Jones,
McFall & Johnson
400 Valley National Building
Tucson, Arizona 85701

Marvin O. Young
Peabody Coal Company
301 North Memorial Drive
St. Louis, Missouri 63102

Arthur Littleworth
Best, Best & Krieger
P. O. Box 1028
Riverside, California 92502

James W. McDade
McDade & Lee
1130 17th Street, N.W.
Washington, D.C. 20036

Burt Pines, City Attorney
Edward C. Farrell, Chief Assistant
City Attorney for Water and Power
Ralph Guy Wesson, Assistant City Attorney
P. O. Box 111
Los Angeles, California 90051

Counsel for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-844

EMERSON SUSENKEWA, ET AL., *Petitioners*,

V.

THOMAS S. KLEPPE, Secretary of the Interior, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jon L. Kyl
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003

John J. Bouma
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073

Donald E. Dickerman
Holesapple, Conner, Jones,
McFall & Johnson
400 Valley National Building
Tucson, Arizona 85701

Marvin O. Young
Peabody Coal Company
301 North Memorial Drive
St. Louis, Missouri 63102

Arthur Littleworth
Best, Best & Krieger
P. O. Box 1028
Riverside, California 92502

James W. McDade
McDade & Lee
1130 17th Street, N.W.
Washington, D.C. 20036

Burt Pines, City Attorney
Edward C. Farrell, Chief Assistant
City Attorney for Water and Power
Ralph Guy Wesson, Assistant City Attorney
P. O. Box 111
Los Angeles, California 90051

Counsel for Respondents

INDEX

Page

TABLE OF AUTHORITIES CITED ii

TABLE OF CASES ..... ii,iii

TABLE OF OTHER MATERIALS iv

QUESTION PRESENTED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

ARGUMENT 3

I. The Hopi Tribe, As Lessor, Is An Indispensable Party To This Action To Cancel A Lease 3

A. There Is No Conflict With Q CF55National Licorice 4

B. There Is No Issue Of Discrimination Against Indians 6

C. There Is No Conflict Among The Circuits 7

II. Sovereign Immunity Of The Hopi Tribe Is Not An Issue 8

CONCLUSION 8

TABLE OF AUTHORITIES CITED

CASES

	Page
Alexander v. Washington, 274 F.2d 349 (5th Cir. 1960)	4
The Bootery, Inc. v. Washington Metropolitan Area Transit Authority, 326 F. Supp. 794 (D. D. C. 1971)	4
Brodsky v. Perth Amboy National Bank, 259 F.2d 705 (3d Cir. 1958)	4
Calcote v. Texas Pac. Coal & Oil Co., 157 F.2d 216 (5th Cir. 1946)	4
Carroll v. New York Life Insurance Company, 94 F.2d 333 (8th Cir. 1938)	4
Davis v. Morton, 469 F.2d 593 (10th Cir. 1972)	7
Dicke v. Cheyenne-Arapaho Tribes, Inc., 304 F.2d 113 (10th Cir. 1962)	8
Egyptian Novaculite Co. v. Stevenson, 8 F.2d 576 (8th Cir. 1925)	4
Franz v. East Columbia Basin Irrigation District, 383 F.2d 391 (9th Cir. 1967)	4
General Tire & Rubber Company v. Watkins, 326 F.2d 926 (4th Cir. 1964)	4,5
Green v. Wilson, 331 F.2d 769 (9th Cir. 1964)	4,8
Haas v. Jefferson National Bank of Miami Beach, 442 F.2d 394 (5th Cir. 1971)	5
Kentucky Natural Gas Corp. v. Duggins, 165 F.2d 1011 (6th Cir. 1948)	4
Kleinschmidt v. Kleinschmidt Laboratories, 89 F. Supp. 869 (N.D. Ill. 1950)	4
Littell v. Hickle, 314 F. Supp. 1176 (D. Md. 1970)	7

TABLE OF AUTHORITIES CITED
Continued

CASES

	Page
Littell v. Morton, 445 F.2d 1207 (4th Cir. 1971)	7
Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975)	3
Morrison v. New Orleans Public Service Inc., 415 F.2d 419 (5th Cir. 1969)	5
National Licorice Co. v. National Labor Relations Board, 309 U.S. 350 (1940)	5,6
Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959)	8
Ogden River Water Users' Association v. Weber Basin Water Conservancy, 238 F.2d 936 (10th Cir. 1956)	4
Schutten v. Shell Oil Company, 421 F.2d 869 (5th Cir. 1970)	4
Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974), *cert. denied* 420 U.S. 962 (1975)	4,7,8
Tucker v. National Linen Service Corporation, 200 F.2d 858 (5th Cir. 1953)	4
Turner v. United States, 248 U.S. 354 (1919)	8
United States v. Blackfeet Tribal Court, 244 F. Supp. 474 (D. Mont. 1965)	8
United States v. Elfer, 246 F.2d 941 (9th Cir. 1957)	5
United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940)	8
Yazzie v. Morton, 59 F.R.D. 377 (D. Ariz. 1973)	4

TABLE OF OTHER MATERIALS

STATUTES

Federal Rules of Civil Procedure, Rule 19(b) 2,5,6,8

National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* 7

TEXTS

3A Moore's Federal Practice, ¶ 19.09 [1] pp. 2311-14 4

OTHER MATERIAL

S. Rep. No. 92-1015, 92d Cong., 1st Sess. p. 59 (1972) 2

Southwest Energy Study, Summary Report, An Evaluation of Coal-fired Electric Power Generation in the Southwest 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-844

EMERSON SUSENKEWA, ET AL., *Petitioners*,

V.

THOMAS S. KLEPPE, Secretary of the Interior, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Whether a suit seeking to invalidate a coal mining lease was properly dismissed for failure to join the lessor as an indispensable party.

STATEMENT OF THE CASE

On June 1, 1964, the Hopi Indian Tribe entered into a drilling and exploration permit with Sentry Royalty Company, Peabody Coal Company's predecessor in interest. On June 6, 1966, the Hopi Tribe entered into the lease now before this Court, which lease provides the coal to fuel two large steam-

generating electric power plants.[1] On May 14, 1971, Petitioners, "traditional Hopi" (a spiritualist faction) brought this suit to invalidate the lease and stop the mining of coal on Black Mesa. The District Court for the District of Arizona held that the Hopi Tribe, being a party to the lease, was an indispensable party under Rule 19, Federal Rules of Civil Procedure. The Court also noted that since the record disclosed substantial expenditure of monies in the implementation of the lease and that the Petitioners had waited for over five years from the signing of the lease, the action would have been dismissed because of laches, were it not necessary to dismiss it for failure to join indispensable parties.

In a unanimous opinion the Court of Appeals for the Ninth Circuit affirmed the District Court Order on July 25, 1975, and denied Petitioners' Motion for Rehearing on September 18, 1975.[2]

REASONS FOR DENYING THE WRIT

Every American court that has ever considered the issue has held that both the lessor and the lessee are indispensable parties in a suit to cancel a real property lease. This suit involves nothing more than the application of that principle. There is no

---

[1] Construction on the Mohave Plant, located in southern Nevada near Davis Dam, began in 1967 and the plant went into operation in 1971; construction on the Navajo Plant, located near Page, Arizona, began in 1970 and the plant became operative in 1975. The plants supply 1560 megawatts and 2370 megawatts of electric power respectively. It is public knowledge that over the next decade or more there is no viable alternative to the Mohave and Navajo Plants. Southwest Energy Study, Summary Report, 10-1; S. Rep. No. 92-1015, 92d Cong. 1st Sess., at 59 (1972). The two plants are dependent upon the coal from the lease in question.

[2] This brief is filed on behalf of the Peabody Coal Company, a Defendant below, and Intervenors below, six power companies with ownership interests in the Navajo and Mohave power plants who have contracted with Peabody Coal Company for coal from the land involved in the lease in question.

conflict between decisions or circuits, and there is no novel or important issue of federal law. The lower courts were correct in dismissing the suit for failure to join an indispensable party, the lessor of the lease.

ARGUMENT

I

THE HOPI TRIBE, AS LESSOR, IS AN INDISPENSABLE PARTY TO THIS ACTION TO CANCEL A LEASE

This is a suit to invalidate a coal lease — that is the sole result sought by Petitioners. The only parties to the lease are Peabody Coal Company's predecessor and the Hopi Tribe. Peabody has been made a party — the Hopi Tribe has not. The Court of Appeals stated the controlling principle:

> No procedural principle is more deeply inbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable. *Broussard v. Columbia Gulf Transmission Company*, 398 F.2d 885 (5th Cir. 1968); *Keegan v. Humble Oil & Refining Co.*, 155 F.2d 971 (5th Cir. 1946); *Tucker v. National Linen Service Corp.*, 200 F.2d 858 (5th Cir. 1953). *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)

Professor Moore has summarized the recognized principle by noting that in any suit "to cancel or rescind a lease . . . all persons interested in the title or who will be directly affected by

the decree are indispensable parties."[3] Despite the multitude of cases cited by Petitioners, not one holds (nor have we found a single case holding) that a suit to invalidate a lease has been allowed to proceed to trial in the absence of one of the parties.

This case, involving a single lessor and a single lessee, with benefits to the lessor amounting to tens of millions of dollars, is the classic case for application of the principle.

A. There is No Conflict with *National Licorice.*

In a rather transparent effort to find a reason to interest this Court in what is actually a simple case involving application of

---

[3] 3A Moore's Federal Practice, ¶ 19.09[1] pp. 2311-14. See also, *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied* 420 U.S. 962 (1975); *Schutten v. Shell Oil Company*, 421 F.2d 869 (5th Cir. 1970); *Franz v. East Columbia Basin Irrigation District*, 383 F.2d 391 (9th Cir. 1967); *Green v. Wilson*, 331 F.2d 769 (9th Cir. 1964); *General Tire & Rubber Company v. Watkins*, 326 F.2d 926 (4th Cir. 1964); *Alexander v. Washington*, 274 F.2d 349 (5th Cir. 1960); *Brodsky v. Perth Amboy National Bank*, 259 F.2d 705 (3d Cir. 1958); *Ogden River Water Users' Ass'n v. Weber Basin W. Cons.*, 238 F.2d 936 (10th Cir. 1956); *Tucker v. National Linen Service Corp.*, 200 F.2d 858 (5th Cir. 1953); *Kentucky Natural Gas Corp. v. Duggins*, 165 F.2d 1011 (6th Cir. 1948); *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir. 1946); *Carroll v. New York Life Ins. Co.*, 94 F.2d 333 (8th Cir. 1938); *Egyptian Novaculite Co. v. Stevenson*, 8 F.2d 576 (8th Cir. 1925); *Yazzie v. Morton*, 59 F.R.D. 377 (D. Ariz. 1973); *The Bootery, Inc. v. Washington Met. Area Transit Auth.*, 326 F. Supp. 794 (D. D.C. 1971); *Kleinschmidt v. Kleinschmidt Laboratories*, 89 F. Supp. 869 (N.D. Ill. 1950).

the Rule 19(b) criteria for indispensable parties.[4] Petitioners have claimed ostensible conflict with a decision of this Court, discrimination and conflicts with cases from other circuits.

First, they contend that the decision of the District Court and the Court of Appeals for the Ninth Circuit conflict with *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350 (1940). In *National Licorice Co.* this Court set aside a labor contract on the grounds that unfair labor practices had led to its execution. The some 140 employees affected by the contract were held not indispensable. The difficulties of joining more than 100 employees are readily apparent, and the Court recognized that its ruling was an exception to the general rule. The opinion states:

> In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. Shields v. Barrow, 17 How. 130, 140, 15 L.Ed. 158; Carroll v. New York Life Ins. Co., 8 Cir., 94 F.2d 333; cf. Waterman v. Canal-Louisiana Bank Co., 215 U.S. 33, 48, 30 S.Ct. 10,14,54 L.Ed. 80. Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present. 309 U.S. at 363.

---

[4] The balancing of the four factors of Rule 19(b) to determine indispensable parties was extensively briefed and is adequately discussed in the opinion of the Court of Appeals for the Ninth Circuit. Weighing the considerations of Rule 19 is, of course, a matter within the trial court's discretion. *E.g. United States v. Elfer*, 246 F.2d 941, 946 (9th Cir. 1957); *Haas v. Jefferson National Bank of Miami Beach*, 442 F.2d 394, 400 (5th Cir. 1971); *Morrison v. New Orleans Public Service Inc.*, 415 F.2d 419, 424 (5th Cir. 1969); *General Tire & Rubber Company v. Watkins*, 326 F.2d 926, 929 (4th Cir. 1964).

The contract in the instant case is not a labor contract, it is a multi-million dollar lease. There is only one lessor, not one hundred. And, Petitioners here assert private rights, not public rights like those asserted by the NLRB, a public body, in *National Licorice*. This case is, therefore, subject to the general rule that "where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it." *National Licorice, supra.*

Petitioners contend that since the alleged rights are based upon the Hopi Constitution and not the coal lease that *National Licorice* is applicable. Petitioners miss one of the primary points of *National Licorice*, that generally interests arising upon a contract — *such as the interests of the Hopi Tribe in the coal lease* — will not be adjudicated in the absence of such parties. Regardless of the genesis of *their* interest, Petitioners cannot require the Court to adjudicate the rights of the lessor to the lease — the object of their action — in the absence of the lessor.

This is a case different from *National Licorice*, not the same case decided differently by a lower court.

B. There is No Issue of Discrimination Against Indians

Petitioners suggest that the decisions below will carve out a significant exception to the usual rules of judicial review. They do not. The District Court and Court of Appeals merely held that a lessor was indispensable to an action to invalidate a lease; and, weighing the factors present in this particular case, determined that Rule 19 required joinder of the lessor Hopi Tribe. It is no more and no less than a straightforward application of the criteria of Rule 19(b) to the facts of a specific case.

C. There is No Conflict Among the Circuits

Two cases are cited by Petitioners as conflicting with the decision below, *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), reversing *Littell v. Hickle*, 314 F. Supp. 1176 (D. Md. 1970), and *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

In *Littell v. Morton*, Rule 19 was not even argued or considered, and a cursory review of the opinion reveals the absence of any similarity to the facts of this case. It hardly presents a conflict of circuits such as to require resolution by this Court.

Davis v. Morton, likewise, does not present such a conflict. The issue in *Davis* was whether the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*, (requiring the filing of an environmental impact statement as a prerequisite to major federal action having a significant effect on the environment) applied to ratification or rejection of leases relating to Indian land. It was not an attack on the lease. Nor was the applicability of Rule 19 either raised by the parties or discussed by the Court in *Davis v. Morton* for the simple reason that it was not involved.

In fact, in a case involving the same lease, *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied* 420 U.S. 962 (1975), the Tenth Circuit pointedly rejected the contention that *Davis v. Morton* involved the issue of indispensability of the Pueblo or cancellation of the lease. The issue in *Tewa Tesuque v. Morton* was identical to the issue in the instant case. The Court held that, in a suit by some members of the Pueblo to cancel a lease between the Pueblo and the lessee, the Pueblo was an indispensable party. The Court therefore affirmed the District Court's dismissal of the case for failure to join an indispensable party, the Pueblo-lessor. A petition to the Supreme Court for a writ of certiorari was denied.

Therefore, not only is there no conflict between circuits, the Ninth and Tenth Circuits have, in virtually identical situations, both held that a lessor Indian Tribe is an indispensable party in a suit to invalidate a lease.

II

SOVEREIGN IMMUNITY OF THE HOPI TRIBE IS NOT AN ISSUE

Sovereign immunity of the Hopi Tribe has not been questioned. The Ninth Circuit correctly held that because Indian tribes enjoy sovereign immunity and cannot be sued without their consent, if the Hopi Tribe were deemed to be indispensable to the litigation under Rule 19, the suit would necessarily terminate, since the Tribe has not consented to the suit. *Turner v. United States,* 248 U.S. 354, 358 (1919); *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512 (1940). The District Court could not grant the relief requested by Petitioners — that the Hopi Tribe be "ordered" into the suit. Further, where, as here, parties have disputed the acts of tribal governing bodies in intra-tribal disputes, courts have consistently declined jurisdiction on the ground of tribal immunity. See *Tewa Tesuque v. Morton,* 498 F.2d 240 (1974) *cert. denied* 420 U.S. 962 (1975); *Green v. Wilson,* 331 F.2d 769 (9th Cir. 1964); *Dicke v. Cheyenne-Arapaho Tribes, Inc.,* 304 F.2d 113 (10th Cir. 1962); *Native American Church v. Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *United States v. Blackfeet Tribal Court,* 244 F. Supp. 474 (D. Mont. 1965).

CONCLUSION

This case involves nothing more than application of the Rule 19(b) factors for determining whether an entity is an indispensable party to litigation — a factual analysis which is (and was) best performed by the District Court. Significantly, not one of the authorities cited by Petitioners holds or even suggests that an action to cancel a real property lease can proceed to

trial without joining the lessor. The Hopi Tribe is an indispensable party to this action.

Respectfully submitted,

Jon L. Kyl
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, Arizona 85003

Marvin O. Young
Peabody Coal Company
301 North Memorial Drive
St. Louis, Missouri 63102

John J. Bouma
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073

Arthur Littleworth
Best, Best & Krieger
P. O. Box 1028
Riverside, California 92502

Donald E. Dickerman
Holesapple, Conner, Jones,
McFall & Johnson
400 Valley National Building
Tucson, Arizona 85701

James W. McDade
McDade & Lee
1130 17th Street, N.W.
Washington, D.C. 20036

Burt Pines, City Attorney
Edward C. Farrell, Chief Assistant
City Attorney for Water and Power
Ralph Guy Wesson, Assistant City Attorney
P. O. Box 111
Los Angeles, California 90051

Counsel for Respondents

January 16, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-844

EMERSON SUSENKEWA, ET AL., PETITIONERS

v.

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 520 F.2d 1324. The opinion of the district court (Pet. App. 7a-9a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1975, and a petition for rehearing was denied on September 18, 1975 (Pet. App. 6a). The petition for a writ of certiorari was filed on December 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Indian Tribe is an indispensable party in a suit by certain members of that Tribe against

the Secretary of the Interior and a private company, seeking to set aside a coal mining lease signed by the Tribe, and approved by the Secretary.

STATEMENT

Petitioners, a sixty-member "traditional" faction of the 5,000-member Hopi Tribe, instituted this action against the Secretary of the Interior and Peabody Coal Company[1] to cancel a coal mining lease entered into by the Tribe and Peabody.[2] The lease, which was approved by the Secretary of the Interior, permits surface mining of land known as the Black Mesa, which is sacred to the "traditional Hopis." Although petitioners sought cancellation of the lease, they did not join as parties defendant either the Hopi or Navajo Tribes, which jointly possess the beneficial interest in and are lessors of the land, or the United States, which holds fee title to the land in trust for the Tribes. The district court dismissed the complaint for failure to join these three indispensable parties, and denied petitioners' motion to join the United States and the Hopi Tribal Council and the Navajo Tribe (Pet. App. 9a). The court of appeals affirmed on the ground that the Hopi Tribe, as lessor, was an indispensable party which, because of its sovereign immunity to suit, could not be joined without its consent or the consent of Congress, neither of which had been demonstrated (Pet. App. 6a). The court therefore declined to reach the question whether the Navajo Tribe or the United States

---

[1]Six power companies with ownership interests in two electric generating plants supplied with coal from the lands involved in this lease under contract with Peabody intervened below.

[2]Petitioners' contention (Pet. 13 n. 6) that they did not seek to void the lease, but only to set aside the Secretary's approval of it, is frivolous, for as they admit (Pet. 37), his approval is a statutory prerequisite to its validity. 25 U.S.C. 415a.

were indispensable parties, or whether their sovereign immunity would prevent their joinder if they were determined to be indispensable parties (Pet. App. 2a).

ARGUMENT

This suit involves an internal dispute among members of the Hopi Tribe holding differing views of the true meaning of Hopi culture and religion and the direction tribal life should take. The complaint charged the Secretary with violating his fiduciary duty to insure the survival of the traditional Hopi culture, religion and ways of life; of arbitrarily interfering with internal tribal affairs and of discriminating against the traditional Hopi faction.[3] But the constituted government of the Hopi Tribe has not sought to withdraw from the lease or to charge that the United States violated its trust in approving the lease. Petitioners do not identify any specific federal statute that the Secretary purportedly violated in approving this lease.

1. The courts below properly held that this suit could not be maintained without joining the Hopi Tribe as a party (see Rule 19, Fed. R. Civ. P.). Compare *Arizona* v. *California*, 298 U.S. 558, 572. It is well established that in a suit to cancel a lease, all persons who will be directly affected by the decree, such as the lessor, are indispensable parties. *Broussard* v. *Columbia Gulf Transmission Co.*, 398 F.2d 885 (C.A. 5); *Keegan* v. *Humble Oil & Refining Co.*, 155 F.2d 971 (C.A. 5); 3A Moore's *Federal Practice*, para. 19.09[1], pp. 2312-2314 (2d ed. 1974).

---

[3]Petitioners concede (Pet. 13) that "[n]one of the rights [they assert] arises out of, or is in any way affected by or dependent on, the terms or provisions of the lease."

Cancellation of the lease unquestionably would have an adverse effect upon the Hopi Tribe (Pet. App. 5a). Over the term of the lease, the Tribe will collect royalties in excess of $20 million, and it also benefits indirectly through the resulting employment of many of its members (*ibid.*). Since the Tribe is a co-lessor of the land, it is obvious that the prejudice that would befall it from the cancellation of the lease could not be lessened or avoided by protective measures in a judgment affording that relief (*ibid.*). Furthermore, any judgment rendered in the Tribe's absence could not provide adequate relief (Pet. App. 5a). Contrast *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102.[4]

Moreover, if petitioners are unable to convince the Hopi Tribal Council that the lease should be cancelled or modified, they have such rights against the Tribe as are provided by the Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. 1301 *et seq.*[5] In light of these circumstances, the court of appeals properly applied the considerations set forth in Fed. R. Civ. P. 19(b) in dismissing the suit for failure to join the Hopi Tribe. See *Provident Tradesmens Bank & Trust Co., supra*, 390 U.S. at 118-119.

---

[4]The most obvious distinction between this case and *Provident Tradesmens* is that in the latter, a judgment for the insurance company posed no significant threat of harm to the absent party, while here, the opposite is true with respect to the absent Tribe. *Id.* at 114-115.

[5]As implemented by 28 U.S.C. 1343(4), that Act gives federal courts jurisdiction to enforce carefully defined rights of individual Indians against the Tribe. See, *e.g.*, *Johnson* v. *Lower Elwha Tribal Community*, 484 F.2d 200 (C.A. 9); *Daly* v. *United States*, 483 F.2d 700 (C.A. 8). Petitioners, however, have not suggested that this lease violated any of their rights guaranteed by the Indian Civil Rights Act.

Tewa Tesuque v. *Morton*, 498 F.2d 240 (C.A. 10), certiorari denied, 420 U.S. 962, is squarely in point. Certain members of an Indian Tribe brought an action against the Secretary of the Interior and a private developer to cancel a real estate lease between the Tribe and that company. The dissidents argued that the lease was unfavorable to the Tribe and should not have been approved by the Secretary, and that the lease prevented them from practicing their traditional religion. There, as here, the absent Tribe was not subject to suit because of its sovereign immunity.[6] After considering the four factors specified in Rule 19(b), the court found that the Tribe was an indispensable party, thus requiring dismissal of the suit. That court's observation is also appropriate in this litigation—internal tribal disputes should be decided by the Tribal Council, not by the federal courts.

2. The decision of the court below does not conflict with any decision of this Court or of any court of appeals.

National Licorice Co. v. *National Labor Relations Board*, 309 U.S. 350, upon which petitioners rely (Pet. 18-22), is wholly inapplicable. The National Labor Relations Board instituted that action by petitioning the court of appeals for enforcement of its order directing the employer-defendant to desist from unfair labor practices. This

---

[6]Contrary to petitioners' assertion (Pet. 28), *Ex parte Republic of Peru*, 318 U.S. 578, does not establish that a sovereign's immunity from suit can only be considered after it is ordered joined in the litigation and has raised that defense. There, the district court already had acquired jurisdiction through the *in rem* seizure of a foreign vessel. The question before the Court was not whether jurisdiction could be obtained over a sovereign by service of process, but whether *in rem* jurisdiction should have been relinquished after the federal government filed a suggestion of the vessel's sovereign immunity from suit. *Id.* at 588.

Court did not consider the applicability of the predecessor of the current Rule 19 to that litigation. Moreover, the joinder principles adopted by the Federal Rules of Civil Procedure were irrelevant to its determination, for those Rules govern only the procedures followed in the United States district courts. Fed. R. Civ. P. 1.[7]

Contrary to petitioners' assertion (Pet. 25-27), the court of appeals' decision does not conflict with either *Littell* v. *Morton*, 445 F.2d 1207 (C.A. 4), or *Davis* v. *Morton*, 469 F.2d 593 (C.A. 10). In *Littell*, an attorney who formerly had obtained substantial legal judgments for an Indian Tribe sought to overturn the Secretary of the Interior's denial of his claim for compensation for fees allegedly withheld in breach of his contract with the Tribe, which the Secretary had approved. Without discussing Rule 19, the court held that sovereign immunity could not bar this contract claim for services rendered, where that result would unjustly enrich the Tribe. Here, however, petitioners are not parties to the lease and do not claim that it has been breached; rather than seeking to enforce the lease, they are trying to annul it. Moreover, no claim of unjust enrichment is involved.

Davis v. *Morton*, *supra*, simply established that the Secretary of the Interior's approval of a long-term lease of restricted Indian land under 25 U.S.C. 415 was a major federal action affecting the environment under

---

In any event, the Court there held that the Board, asserting "a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices" (309 U.S. at 364), had authority, in the absence of the individual employees as parties to that proceeding, to order an employer not to enforce a provision of their employment contracts found to have been procured in violation of federal law. Here, in contrast, a small faction of Hopis, who are not a public body, are seeking to invalidate a mining lease to the disadvantage of the entire Tribe, without joining the lessor. Thus, there is no "public right" justification for dispensing with the joinder rule normally applicable in contract cases.

Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). Accordingly, the court enjoined the Secretary from approving a 99-year lease of Indian land until he had prepared an adequate environmental impact statement. Since that suit did not seek to set aside the lease, the question of the joinder of the Indian Tribe-lessor was not raised.[8]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

EDMUND B. CLARK,
JACQUES B. GELIN,
Attorneys.

MARCH 1976.

---

[8] Unlike *Heckman* v. *United States*, 224 U.S. 413, this litigation does not involve the assertion of federal authority to cancel the conveyance by Indian grantors of tribal lands alienated in violation of federal law. The United States may fully exercise its distinct governmental interest in restricting such lands, and that interest is not dependent upon its "property * * * rights * * * or to the holding of a technical title in trust." *Id.* at 437. The Court held that since the Indian grantors were in any event precluded from taking any position that would have supported the illegal alienation, they need not have been joined as parties when the United States instituted legal proceedings to vindicate its interest in restricting those lands. *Id.* at 445.